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Supreme Court of the United States

OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RALADAM COMPANY, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RALADAM COMPANY.

OPINION BELOW.

The opinion of the lower court—the Circuit Court of Appeals for the Sixth Circuit (R. 469-480)—is reported in 42 Fed. (2d) 430.

THE QUESTION.

The question presented is as to the jurisdiction of the Federal Trade Commission, and is limited to that (R. 480).

More particularly, the question is as to the power of the Commission to require that the respondent, Raladam Company, shall cease and desist from advertising, in newspapers and magazines, that its treatment (Marmola Pre-

scription Tablets) for the reduction of excessive fat is (1) scientific, and (2) that it can be self-administered internally according to directions, with reasonable safety, under usual and ordinary conditions and circumstances, by the average excessively fat person, having an average case of excessive fatness.

THE STATUTE.

Inasmuch as the relevant part of the statute (Sec. 5 of the Trade Commission Act, 38 Stat. 717, 719), upon which the case at bar turns, is printed in the appendix of the Commission's brief (pp. 41-44), it is not printed in this brief.

STATEMENT.

The facts that the Commission sets forth in its brief (pp. 7-14),—upon the assumption that such facts "may be of importance in deciding the jurisdictional question",—appear to respondent to be incomplete. Respondent, therefore, respectfully supplements them.

Respondent labeled each box of its product, "Marmola is recommended as a treatment for the reduction of excessive fat" (Comm. Exs. 2, 3, R. 42-44, 1, 2),—the "treatment" consisting of thirty-six medicinal tablets (called Marmola Prescription Tablets), intended to be self-administered internally, and of a booklet of instructions (R. 43, 388, 417-424), which were inside the box.

Each of respondent's tablets contained one-half of a grain (1/2 gr.) of desiccated thyroid, together with various other substances (Comm. Ex. 4, R. 48, 1, 2, 9, 422).

The desiccated thyroid was the principal fat-reducing ingredient of respondent's tablets,—the active agents in desiccated thyroid being iodine and thyroxin (R. 129, 202,

271, 298). The cascara sagrada, phenolphthalein, and liquid petroleum in the tablets, were laxatives (R. 50, 53, 82, 117, 182). The extract of bladderwrack (a seaweed) and the extract of phytolacca (pokeroot) contained in the tablets, possibly had a synergistic effect (R. 314),—the bladderwrack containing a small amount of iodine compound (R. 180), and the phytolacca being a laxative (R. 180-181, 313-314). The other ingredients were without particular physiological effect, and were put into the tablets to subserve manufacturing convenience, and to improve the appearance, taste, and keeping qualities of the tablets (R. 53, 181, 267).

The booklet of instructions that was contained inside each box of tablets, set forth the formula in accordance with which the tablets were made (R. 422), and gave instructions not only as to how many tablets should be taken, and when, and for how long a time, but also as to diet and exercise, and other matters as well (R. 43, 388, 417-424). Such booklet stated that the tablets were intended for the "average person" (R. 422), with the "average case" of excessive fatness (R. 418, 422), and read, "Consult your own physician if you want special advice in any unusual condition" (R. 422).

Respondent advertised its treatment widely, in newspapers and magazines, throughout the United States (R. 60-61). The character of respondent's advertising matter is shown by the record (Comm. Exs. 6, 7, 8, R. 65, 1, 2; Comm. Ex. 9, containing 107 sample advertisements, R. 108, 1, 2; Comm. Exs. 10, 11, 12, R. 109-110, 1, 2; R. 388, 425-435). Respondent advertised its tablets to fat people, not to mankind in general.

The Commission charged, in its complaint (R. 2-6), that certain statements that were enumerated in the complaint

(R. 3-4), had been made in respondent's published advertisements; and that such statements had "the tendency and capacity to mislead and deceive the purchasing public" (R. 5); and that, therefore, respondent was guilty of "using unfair methods of competition in interstate commerce" (R. 2), "to the prejudice of the public and of competitors of respondent" (R. 5).

There was no charge in the complaint that respondent acted fraudulently, or with any intent to deceive, in making in its advertisements the statements that the complaint assailed. Neither was there any charge that respondent's tablets were without potency to reduce fat,—mere shams for use in fleecing the public. The charge was rather that such tablets were too potent, and were accordingly dangerous.

The alleged statements in respondent's advertisements that were attacked in the complaint, were subsequently found by the Commission to have been made by respondent, and to have been "false and misleading" (R. 23). But the Commission did not make any finding of any fraud, or of any intent to deceive, on respondent's part. The Commission merely found, in substance, that respondent was making unenlightened statements about its treatment, which, although honest enough, were not, in the Commission's estimation, true and accurate, and so were false and misleading.

The alleged statements in respondent's advertisements that were attacked in the complaint, and were subsequently found to have been made by respondent and to have been false and misleading, are reflected by the terms of the order to cease and desist (R. 26-27), which was eventually issued by respondent.

Such order required (R. 26) that respondent should cease to advertise its treatment "as a scientific and ac-

curate method of treating obesity" (R. 26); or to advertise that "the formula from which 'Marmola' is made is a scientific formula" (R. 26); or to advertise that "'Marmola' is the result of scientific research" (R. 26). For convenience of discussion, the specific prohibitions that were thus imposed upon respondent, may be referred to, in general terms, as an order that respondent should not advertise its treatment as scientific.

Such order further required (R. 26-27) that respondent should cease to advertise that its treatment could "be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity"; or to advertise that its treatment could "be taken with no harmful result to physical health without the advice and direction of competent medical authority"; or to advertise its treatment at all "as a remedy for the treatment of obesity unless such representation is accompanied by a statement that 'Marmola' cannot be taken with safety to physical health except under the direction and advice of competent medical authority."

For convenience of discussion, such prohibitions may be referred to, in general terms, as a prohibition that respondent should advertise its treatment as one that could be safely self-administered internally (*i. e.*, safely taken internally without medical direction or control).

The Commission says in its brief (p. 6) that respondent, in its petition for review (R. 373-384), did not take any exception to the Commission's having found that the respondent had made, in its advertisements, the representations concerning respondent's treatment that are reflected by the terms of the Commission's order to cease and desist. That is true. But also it is true that the findings that the Commission made, as reflected by the

terms of its order, must be construed and given effect (as must the order itself), in the light of the whole record, and not otherwise.

The respondent's advertisements that are in the record, show that respondent did expressly state in its advertisements, in substance, that its treatment was scientific. Therefore, the findings by the Commission that the respondent did so advertise, may justly be given effect in the terms in which they stand, as reflected by the terms of the Commission's order.

But there is not a shred of evidence in the record to show that respondent ever expressly stated in its advertisements, that its treatment could be safely self-administered. The only representation that respondent ever made at all, in respect of whether or not its treatment could be safely self-administered, arose by implication from the fact that it advertised its treatment as one intended to be taken internally, and to be self-administered. The fact that respondent advertised its treatment for sale, as one to be self-administered internally, implied that respondent's treatment could be self-administered internally with some degree of safety,—not necessarily with absolute, unlimited safety,—by the generality, not of mankind, but of the particular class of persons to whom the treatment was advertised, namely, the excessively fat. The fair implication of respondent's advertisements thus did not exceed an implied representation that respondent's treatment could be self-administered internally with reasonable safety, in accordance with directions, by the average excessively fat person, having an average case of excessive fatness,—under usual and ordinary conditions and circumstances.

The finding of the Commission, as reflected by its order, in respect of respondent's having advertised its treatment

as safe for self-administration internally, gets the only support that can be found for it in the record, from the implication that arose—in terms as above stated—out of respondent's having advertised its treatment as one intended to be taken internally by the excessively fat; and such finding must be confined, in its meaning and effect, within the limits of such implication. Unless such finding be so confined, it must be regarded not only as not supported by any substantial evidence, but as not supported by any evidence at all, in the record; and hence it must fall altogether.

The effect that the Commission's order, if valid, would have in respect of the continued operation of respondent's business, is manifest.

The part of the Commission's order that forbids respondent to advertise its treatment as scientific, is of relatively small importance. If valid, such part of the order would not be ruinous of respondent's business.

The part of the order that forbids the respondent to advertise that its treatment can be safely self-administered internally, is of a different character. If valid, such part of the order means, in practical effect, that respondent cannot advertise its treatment at all,—which is the same thing as saying that respondent cannot continue in business at all. That conclusion follows from the circumstance that if respondent advertises its treatment at all, as one intended to be taken internally, respondent thereby necessarily implies that it can be safely self-administered; and from the further circumstance that, if respondent must qualify such implication solely in the manner that is specified in the Commission's order, and in no other manner,—namely, by advertising that the only way in which a person that buys respondent's treatment may safely take it, is by first employing a physician, and administering the

treatment to himself under such physician's direction and control, and not otherwise,—then, for all practical purposes, respondent might as well, or better, not advertise its treatment at all, and shut up shop altogether.

The Commission's entire attack upon the respondent's act of advertising, by implication, that its treatment may be safely self-administered, is grounded upon the fact that respondent's Marmola tablets contain desiccated thyroid. That appears conclusively from the complaint (R. 4-5).

It is true that there is a finding (R. 22, and R. 24, par. 11) that, because of the laxative content of Marmola tablets, the taking of respondent's treatment would be likely to create a "laxative habit," on the part of the person taking the treatment. That finding may be supposed to be intended to support the conclusion that respondent's treatment is not scientific, and may not be safely self-administered internally. But there is no charge in the complaint that respondent's advertisements were rendered false and misleading by reason of the laxative content of respondent's tablets; there is not even a reference in the complaint to the laxative content of respondent's tablets, and nothing at all in the complaint to which the finding as to the creation of a "laxative habit" may be regarded as germane.

Although the record contains some evidence about laxatives and the creation of a "laxative habit",—as to which the testimony of at least one of the Commission's own medical witnesses may reasonably be surmised not to have been altogether satisfactory to the Commission (R. 117),—the record shows that the Commission's principal effort was directed towards showing that desiccated thyroid is a dangerous substance, and cannot be administered safely except under medical surveillance; and that, therefore,

respondent's treatment,—because its tablets contain desiccated thyroid, and are intended to be self-administered,—is unsafe and unscientific; and that, therefore, respondent's representations in its advertisements—expressly to the effect that its treatment is scientific, and impliedly to the effect that its treatment is reasonably safe for self-administration by an average excessively fat person—are false and misleading.

The Commission did not produce anybody to testify that he, or she, had ever been injured by the self-administration of respondent's tablets internally. Neither did the Commission produce any witness to testify that he, or she, had ever seen anybody that had ever been injured by the self-administration of respondent's tablets internally. Respondent's tablets have, however, been made and sold continuously, for upwards of twenty years,—since August, 1907 (R. 38-39).

The Commission sought to establish the dangerous character of desiccated thyroid,—and, therefore, the unsafe and unscientific character of respondent's treatment,—solely by the opinion evidence of medical witnesses. The record is, however, replete with evidence—some of it supplied by the Commission's own witnesses—that desiccated thyroid is not an inherently dangerous substance at all.

Desiccated thyroid can be bought by anybody, even a child, at any drug store, without a prescription, the same as can calomel, or quinine, or laxative pills, or any other non-poisonous drug (Resp. Ex. 1, R. 91, 53-54, 237, 297, 326).

Desiccated thyroid is a standardized substance, listed in the United States Pharmacopoeia (U. S. P.). According to that authority, and other testimony, desiccated thy-

roid is a yellowish powder with a slight, characteristic odor; is made by drying and powdering the thyroid glands of domesticated animals that are used for food by man, after first freeing such glands from connective tissue and fat, five grains of fresh glands producing about one grain of dried gland; and contains on an average about 0.2 per cent—which would be two parts in a thousand—of iodine (R. 129, 271, 298). In addition to the iodine, desiccated thyroid is supposed to contain another active substance, called thyroxin; only a very little of such latter substance has ever been isolated, however, and a number of tons of thyroid were required to be reduced, in order to obtain that little (R. 202),—so that the thyroxin content of desiccated thyroid may accurately be said to approach very closely to the limit of smallness (R. 202). Each of respondent's Marmola tablets, containing one-half of a grain of desiccated thyroid, may thus be said to contain about one one-thousandth of a grain of iodine, and an infinitesimally small quantity of thyroxin.

The administration of desiccated thyroid is a recognized treatment for obesity (R. 145-146, 297, 300). Taking desiccated thyroid will reduce weight, whether the thyroid be self-administered in the form of respondent's tablets, or be administered by a physician (R. 92, 95).

Desiccated thyroid does not contain any morphine, or any derivative of morphine (R. 150). It is not a dangerous drug (R. 328),—if indeed it should not rather be called a "biological," instead of having the word *drug* applied to it at all (R. 298, 299). It is not habit-forming; nor is it a contraceptive agent; nor can it be used for homicidal or suicidal purposes (R. 328, 335). A few physicians "felt quite a phobia" about thyroid, fifteen or twenty years ago; but physicians generally have got over their awe about thyroid (R. 327, 328).

The thyroid glands of domesticated food animals, from which desiccated thyroid is prepared, are located in their necks. In preparing head-cheese, which as everybody knows was commonly made and sold in all butcher-shops before the great development of the packing industry, the part of the neck that contained the thyroid glands, went into the head-cheese, and everybody that ate head-cheese administered to himself internally a small dose of thyroid (R. 298-299). Thyroid is a normal constituent of the human body, and of the bodies of all mammals (R. 298-299, 304); and if the diet is such that thyroid does not occur in the food, it is desirable that thyroid, or its constituents, be obtained from some other source (R. 298-299).

The harrowing instances of the apparently injurious effects of taking thyroid that are set forth in the Commission's brief (p. 12), indicate nothing except that the persons that are there referred to, had what the doctors call an idiosyncrasy for thyroid. In the parlance of the medical profession, to say that a person has an idiosyncrasy for any particular substance, means that such person is specially sensitive to such substance, and that when he consumes it internally, he experiences unpleasant results or develops disagreeable symptoms—such, for instance, as excitement, hives, angioneurotic edema, hay fever, asthma, a sudden rise in temperature, or even convulsions —that the average person does not experience or develop (R. 336-337, 238). Among the substances in respect of which, in addition to thyroid (R. 104, 177, 220), idiosyncrasies have been observed to be more or less frequent, are alcohol, morphine, quinine, strawberries, shell fish, lobsters, cow's milk, and white bread (R. 101, 126-127, 149-150, 336-337).

The dose of desiccated thyroid, as given in the present (tenth) edition of the U. S. P., is one grain; in the ninth revision, it was one and one-half grains; in the 1900 (R. 194) or eighth revision, it was four grains,—such dose to be given one, two, three, or four times a day, in the discretion of the physician (R. 351, 236, 271, 272, 325, 327). The statement in the Commission's brief (p. 9) with reference to respondent's having reduced the thyroid content of its tablets from time to time, is to be read in the light of the successive reductions of the U. S. P. dose of thyroid.

Nobody knows what the lethal, or fatal, dose of desiccated thyroid is, in the case of a healthy human being; as a guess, it is up in the hundreds of grains (R. 333-334, 342).

A dose of forty grains might be injurious by raising the metabolic rate of the person taking it, to an unduly high point (R. 237, 252, 335-336). But in some cases of nephrosis,—a kidney disorder that involves primarily the tubules,—a dosage as high as sixty grains a day has been used over a long period of time (R. 289).

Dr. Haverstock, who—as noted in the Commission's brief (p. 13)—regularly gives his patients from a minimum of six to a maximum of forty grains of thyroid a day (R. 363), specializes in the treatment of obesity, and has treated several thousand patients in the last ten or twelve years, and has been using thyroid for that length of time, and uses half a million grains of thyroid a year in his practice (R. 362). The doses given by some of the other physicians that testified, are noted in the Commission's brief (p. 13). In addition, it may be noted of the Commission's witnesses, that Dr. Strouse gives doses of from one-fourth to one-half of a grain of thyroid, three times a day (R. 141); Dr. Kebler, from one-fourth of a grain to fifteen grains a day (R. 194); and Dr. Clark, from one-

tenth of a grain to three grains a day (R. 223). Dr. Kebler can hardly be said to be a practicing physician at all (R. 171, 191-192). The indication of the record is that Dr. Haverstock had probably had more actual experience in administering thyroid, than all of the other doctors combined.

Persons taking respondent's tablets according to directions, four times a day, would take only two grains of thyroid daily. The Commission's own witness, Dr. Elliott, testified, "I don't believe a very high percentage [of obese people] would be definitely harmed by that amount",—*i.e.*, by two grains of thyroid daily, taken in four quarter-grain doses (R. 103-104). And there is no question but that the respondent honestly believes its treatment to be safe (R. 52).

All drugs that have any physiological effect,—and even some food substances, such as salt, mustard, sugar, meat, fat, and bread,—if taken in too large doses and for a long enough time, have a toxic effect and produce toxic symptoms (R. 96, 126).

The symptoms that develop upon taking too much thyroid,—a more rapid heart action, nervousness, tremors, sweating, and sleeplessness,—are merely those that follow from unduly increasing the metabolism of the body by violent exercise, such as by running (R. 97-98, 100);—meaning, by "metabolism", the whole life process (except reproduction), the sum total of all of the chemical and physio-chemical changes that take place in the body between the time when materials from the outside (such as air, water, and food) enter the body, and the time when they get back to the outside world again (R. 121, 300-301). Inasmuch as thyroid is a normal constituent of the human body, and of the bodies of all mammals, it cannot, even in

large doses, do anything more than to increase the chemical changes of the body, so that they are sped up to an increased rate. If a person takes too much thyroid, he becomes alert; but he does not have convulsions. He perspires; but he does not go into collapse. He has a tremor; but the tremor never develops into a general spasm. If a person should take large doses of thyroid "for quite some time", he might lose rapidly in weight, but he would not die (R. 304, 298-299).

A person that develops the symptoms that follow upon the taking of too much thyroid, is likely to find them disagreeable, and to stop taking the thyroid and consult a physician accordingly (R. 98-99). If he doesn't consult a physician at all, the disagreeable symptoms disappear spontaneously, within from four to six days after he stops taking thyroid; and that is the end of the matter (R. 106, 104). If a person takes too much thyroid, it does not deplete his system; it does not make him more susceptible to contagious diseases than otherwise he would be. Thyroid is one of the great anti-toxins manufactured in the body; and hyperthyroidism increases resistance to infection from pneumococci, streptococci, and staphylococci (R. 316, 318).

The advice that was contained in the booklet that respondent supplied with each box of its tablets,—"Consult your own physician if you want special advice in any unusual condition",—was very well adapted to prevent anybody's being injured through overdosing himself with thyroid by taking respondent's tablets. The words "unusual condition", which respondent used in its booklet, are about the words that a physician would use upon dismissing a patient, after prescribing a course of medication for him, with instructions to return by a day certain; he would say to the patient, with a view to safeguarding

against overdosing, "If any unusual condition develops, come back even before the time I have set" (R. 311, 248-249).

The Commission asserts with great confidence in its brief (p. 9), just what happens when thyroid is administered,—namely, the increasing of the "burning up of food products and bodily tissues", due to the fact that the thyroid "enters the blood stream and stimulates all cells". The doctors that the Commission called as witnesses, are not so confident that they know so much about the action of thyroid. After having testified that thyroid stimulated the metabolic activity of the cells of the body, Dr. Elliott, when asked "How does it do it?", answered "God knows; nobody else"; and when asked "Why does it do it?", answered, "Nobody knows" (R. 106). Nevertheless, he considered, he said, that physicians did not administer thyroid just by an empirical trial-and-error process, but that they could and did achieve a "very scientific" administration of thyroid; but he also thought, he said, that an achievement could be "scientific", even though "you don't know how or why it happens" (R. 106),—which perhaps indicates that the word *scientific* is of very loose and vague connotation, elsewhere than in respondent's advertisements. Dr. Clark, when asked whether the chief action of thyroid is to increase the metabolic rate, said: "When you get on the subject of the ductless glands [i.e., in the human body], you are on a subject that is still in the process of being worked out. That is one of the chief functions of the thyroid gland, to give off a substance that increases the activity, but it probably gives off other substances that are related to the other ductless glands, like the pituitary, the ovaries, the testicles, the adenals [adrenals] and so forth" (R. 225). Dr. Kebler testified that the medical profession changed its ideas, and made ad-

vancements, from time to time, in respect of thyroid, as well as in respect of everything else (R. 195). Dr. Elliott testified that it often happens that he thinks that he knows all about a given therapeutic measure, and subsequently changes his mind; and that he was not prepared to say that he would not change his view in respect of thyroid (R. 103). One of the Commission's witnesses (Dr. Woodyatt) testified that "if it were a case of incipient goitre it might be flared up by the administration of too much thyroid" (R. 118); another of the Commission's witnesses (Dr. Elliott), as understood, testified circumstantially to just the opposite (R. 74-75).

It is not essential to the safe administration of thyroid that a person's basal metabolic rate (B. M. R.), referred to in the Commission's brief (p. 10), should be ascertained in advance of beginning the administration of thyroid, and watched while the administration of thyroid is going on; in other words, it is not essential that thyroid should not be administered except under what the Commission's witness, Dr. Elliott (R. 86), referred to as "metabolic control". The only method of measuring a person's B. M. R. is by means of one or another of several sorts of machines. Thyroid was regularly administered for twenty years before such machines were invented. Such machines are not generally available, even now; they cannot be operated except by specially trained operators; they take account of only one of the several bodily processes that enter into metabolism; and are recognized by the medical profession, generally, to give only inaccurate and rather unreliable results (R. 241, 255, 301-302, 353, 195-196).

It is true that all of the respondent's medical witnesses testified that they examined their obese patients physically, before administering thyroid to them; but they also testified that they examined all of their patients physically,

before administering anything at all to any of them. And they were not moved to examine obese patients, to whom they proposed to administer thyroid, by any consideration that thyroid is a dangerous substance, but by quite other considerations (R. 354-355).

It is true, also, that the respondent's medical witnesses testified that they kept their obese patients under surveillance, while such patients were undergoing treatment. But that practice, too, was dictated by other considerations than that thyroid is a dangerous medicament (R. 310, 355). And Dr. Keeton testified that he had permitted two of his patients, each of whom was taking two grains of thyroid daily, to go from Chicago to Florida,—inferably to remain for the winter,—and to continue taking two grains of thyroid daily while they were there, entirely free from medical supervision; and that he had not adopted any other precaution than to tell such patients that if certain symptoms, which he attempted to describe to them, should appear, they should then discontinue taking the thyroid (R. 258, 265-266).

There is, of course, some testimony—whether properly to be regarded as substantial, or not—to the contrary. There is testimony to the effect that it is not safe to take any drug,—even castor oil,—except under medical direction and control (R. 96); and to the effect that it is not safe to undertake to reduce obesity, even by dieting and exercising,—without the use of any drug,—except under medical supervision (R. 86, 125, 209, 222).

Respondent's Marmola tablets are, and for fifteen years have been, manufactured for respondent, and for the former owner of respondent's formula,—in accordance with such formula,—by Parke, Davis & Company (R. 34, 38-39). That company, by its physician, has made sugges-

tions from time to time, as to changing the formula, *e. g.*, as to reducing the thyroid content of the tablets (R. 49-51). The formula is a safe and scientific one (R. 313-314).

The Commission's medical witnesses testified that, in their opinion, respondent's treatment was neither scientific nor safe (R. 84, 86, 115-116, 187, 190, 220). The respondent's witnesses testified that they regarded the respondent's treatment as both scientific and safe,—and they told circumstantially why they thought so (R. 244, 246-247, 249, 251, 257, 267, 276, 280-281, 304-307, 313-314, 319, 326, 328, 333, 336, 347, 352, 363-364).

The Commission's trial examiner,—before whom all of the testimony that was taken had been adduced, and who alone had heard any of the witnesses testify or had seen them while they were testifying (R. 471, 458, 376),—made a report upon the facts to the Commission (R. 461-468). Such report is referred to in, and an excerpt therefrom is quoted as a footnote to, the lower court's opinion herein (R. 472). In such report, the Commission's trial examiner said, in substance, that all of the medical witnesses that testified,—five for the Commission, and six for the respondent,—appeared to be of equally high standing in their profession, and of equal credibility; that however the two groups of witnesses differed sharply in their testimony as to whether or not respondent's treatment was scientific and safe; and that such issue appeared to be a scientific dispute, the determination of which could not be safely or justly predicated upon the evidence that had been taken.

SUMMARY OF ARGUMENT.

The first division of the portion of this brief that is hereinafter devoted to argument (pages 19 to 24, *infra*), headed, "The Commission Misapprehends the Grounds upon Which the Lower Court Denied the Commission's Jurisdiction",—is, in effect, a summary of the entire argument that is presented in behalf of the Raladam Company.

ARGUMENT.

I.

THE COMMISSION MISAPPREHENDS THE GROUNDS UPON WHICH THE LOWER COURT DENIED THE COMMISSION'S JURISDICTION.

By the terms of Section 5 of the Trade Commission Act, the power of the Commission is limited (1) to making "findings as to the facts", which, "if supported by testimony, shall be conclusive", and (2) to issuing orders, based on such findings, requiring persons to "cease and desist", (3) from using "unfair methods of competition in commerce", (4), if, and only if, the issuance of such orders is "to the interest of the public"; and by the terms of Section 4 of such Act, "commerce" means only interstate or international commerce. The term "unfair methods of competition in commerce" describes a concept of law. *Federal Trade Commission* v. *Gratz* (1920) 253 U. S. 421, 427, 437. So, also, does the term "to the interest of the public" describe a legal concept. "The specific facts established may show, as a matter of law, that the proceeding which it [the Federal Trade Commission] authorized is not in the public interest, within the meaning of the Act." *Federal Trade Commission* v. *Klesner* (1929), 280 U. S. 19, 30.

The determination of the question whether the Commission had power to issue the order that is involved in the case at bar, depends upon ascertaining the content of the respective legal concepts that are described by the terms "unfair methods of competition in commerce", and "to the interest of the public"; upon ascertaining whether the Commission limited itself to making findings as to the facts, or undertook to settle disputed questions of scientific opinion; upon ascertaining whether the order that the Commission issued, was merely an order to "cease and desist", or something else; and upon ascertaining whether such order was really—as distinguished from avowedly—issued to protect competition and competitors in interstate commerce, or for some other purpose.

The Commission's brief, as understood, appears to assert, in substance, that the lower court grounded its denial of the Commission's jurisdiction, upon one or more of the following considerations:

(1) That the term "unfair methods of competition in commerce", as used in the Trade Commission Act, includes only (a) "those situations indicating a substantial tendency to restraint of trade and monopoly", and (b) "'palming off' cases". (Commission's brief, pp. 16, 19-20, 20-24.)

(2) That such term,—"unfair methods of competition in commerce",—as used in such Act, excludes all of the following: (a) Unfair competitive practices that are injurious only to disreputable, dishonest competitors, and the suppression of which will benefit only such competitors. (Commission's brief, pp. 17, 20, 24-25, 27-28.) (b) Unfair competitive practices that are injurious to any competitor except one affirmatively shown not to be guilty of the use of unfair competitive methods himself. (Commission's brief, pp. 17-18, 20, 28-32.) (c) Unfair com-

petitive practices that consist of acts that are within the jurisdiction of the Department of Agriculture and the Department of Justice, under the Food and Drugs Act. (Commission's brief, pp. 32-33.) (d) The making of such representations as were made by respondent in its advertisements, as to its Marmola treatment being "scientific" and "safe". (Commission's brief, pp. 18, 33-39.)

(3) That the import of the term "to the interest of the public", as used in the Trade Commission act, is such as to require a conclusion that it is not "to the interest of the public" that unfair competitive practices against only dishonest, disreputable competitors alone, should be suppressed. (Commission's brief, pp. 16-17, 26-27.)

It is respectfully submitted that no consideration approximating to even the general nature of any of those that are above noted,—except, perhaps, to the general nature of those above numbered (1), (2) (d), and (3),—entered at all into the lower court's denial of the Commission's jurisdiction.

It is respectfully submitted that the considerations upon which the lower court's denial of the Commission's jurisdiction can be sustained,—without regard to whether, or to what extent, the lower court actually took all of such considerations into account in reaching its decision,—are substantially these:

(1) That the term "unfair methods of competition in commerce", as used in the Trade Commission Act, includes only such competitive practices as—in addition to being "unfair"—tend substantially to suppress, competition, either directly, or indirectly through the medium of injuring the competitors of the person using any such practice, either by unfairly lessening the market for the commodity sold by such competitors, or by weakening

their competitive strength by unfairly depriving them of their customers, or otherwise. (See pages 24 to 39, *infra*).

(2) That the term "unfair methods of competition in commerce" excludes practices that, although injurious to members of the purchasing public, do not tend substantially to suppress competition. (See pages 40 to 47, *infra*.)

(3) That the Commission's power is limited to making findings in respect of matters of fact, and does not extend to determining either disputes as to matters of opinion, or questions of law; and that the question of what implied representations as to the safety of self-administering respondent's treatment internally, were made by respondent's publishing its advertisements, is a question of law; and that the representations, both express and implied, that were made by respondent's advertisements, were representations as to matters of mere opinion,—so that the Commission's declaring such representations to be false and misleading, necessarily amounted to nothing else than an attempted determination of a controverted question of opinion, and of medical opinion at that. (See pages 47 to 58, *infra*.)

(4) That if the publishing of advertisements in newspapers and magazines falls at all within the term "unfair methods of competition in commerce", and so within the cognizance of the Commission,—which is denied,—the prevention of the publishing of such advertisements cannot lie within the Commission's power, unless the advertisements published are not merely false and misleading, but are fraudulent. (See pages 58 to 61, *infra*.)

(5) That if such term—"unfair methods of competition in commerce",—as used in such Act, includes the publishing of advertisements in newspapers and magazines at all,

(which is denied), then the advertisements that were published by respondent do not fall within such term, for two reasons: (a) because respondent's advertisements were not fraudulent; and (b) because, if respondent's advertisements were fraudulent, there is no substantial evidence that respondent had any competition, or any competitors, in selling medicinal internal antifat treatments in interstate commerce, to which, or to whom, the publishing of respondent's advertisements was, or could be, injurious. (See pages 61 to 84, *infra*.)

(6) That such term,—"unfair methods of competition in commerce",—as used in such Act, does not include the publishing of advertisements in newspapers and magazines, regardless of the character of the advertisements, whether fraudulent or not; because to permit the Commission to exercise preventive control of the publication of any newspaper or magazine advertisement whatsoever, would be repugnant to the provision of the First Amendment that guarantees freedom of speech and of the press. (See pages 85 to 105, *infra*.)

(7) Inasmuch as the power of the Commission is limited to interstate commerce, the Commission had no lawful power to institute its proceeding, or to issue its order, against respondent; because the real, as distinguished from the avowed, purpose of the Commission's proceeding and order against respondent was not to prevent injury to, or the suppression of, competition in the selling of proprietary medicinal internal antifat treatments in interstate commerce, or to prevent injury to respondent's competitors, if any, in such commerce,—but was rather to destroy respondent's business, for the benefit of members of the medical profession, who, although they were the persons that were injured, principally if not indeed exclu-

sively, by the selling of respondent's Marmola treatment, were not, in the practice of their profession, engaged in interstate commerce at all, and hence were not entitled to be protected by the Commission against "unfair methods of competition in commerce", or against anything else. (See pages 105 to 117, *infra.*)

(8) That the Commission's order against respondent is void, because it is such, in its terms, as to go beyond a mere order to "cease and desist", and hence was in excess of respondent's lawful powers. (See pages 117 to 120, *infra.*)

(9) That it is not "to the interest of the public", within the meaning of that term as used in the Trade Commission Act, that the Commission should spend its time, and the public's money, in instituting the proceeding that was instituted, and issuing the order that was issued, against respondent; because all (and not only just some) of such competitors, if any, as respondent had in the business of selling proprietary medicinal internal anti-fat treatments, were relatively disreputable. (See pages 121 to 131, *infra.*)

II.

THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" INCLUDES ONLY SUCH PRACTICES AS ARE BOTH UNFAIR, AND ALSO TEND SUBSTANTIALLY TO SUPPRESS COMPETITION.

The first use by any court of the term "unfair methods of competition", occurred—as far as has been discovered—in *Standard Oil Co.* v. *United States,* (1911), 221 U. S. 1, and thus preceded the passage of the Trade Commission Act by upwards of three years. In that case, in summarizing the Government's bill of complaint, Chief Jus-

tice White, for the majority of the court, said in part, at pages 42-43, that

> "the bill at great length additionally set forth various means by which....., in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects ....., it suffices to say that such averments may be grouped under the following heads: ....*unfair methods of competition*, such as local price cutting at the points where necessary *to suppress competition*; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, which the like intent" [*i. e.*, "where necessary to suppress competition"].

The four practices that Chief Justice White thus characterized generically as "unfair methods of competition", —namely, local price cutting, espionage, the operation of bogus independent companies, and the giving of rebates, wherever necessary to suppress competition,—were but special instances of a numerous class of practices, the existence of which practices, and their potentiality to destroy competition and to promote monopoly, had been brought to light in litigation, under the Sherman Act (26 Stat. 209), that had preceded the enactment, on September 26, 1914, of the Trade Commission Act. See, for instance, *Peoples Tobacco Co.* v. *American Tobacco Co.* (1909), 170 Fed. 396, 399-403; *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (1910), 180 Fed. 160, 166-168; *United States* v. *Patterson* (1912), 201 Fed. 697, 701-704; *United States* v. *Hamburgh American S. S. Line* (1914), 216 Fed. 971, 973.

Publicists and economists, also, had used the term, "unfair methods of competition", prior to the enactment of the Trade Commission Act, in substantially the same sense as that in which Chief Justice White used such term, in the *Standard Oil case* (221 U. S. 1, 43), as above quoted. Thus Mr. E. Dana Durand, in lecturing on "The Trust Problem", at Harvard University in April, 1914, made reference to "Price discriminations and other *unfair methods of competition*". In addition to price discriminations, he recognized as "*unfair competitive methods*" the obtaining of preferential rates from common carriers, and exclusive purchase and sale arrangements. *Quarterly Journal of Economics*, Vol. 28, pp. 391, 392-394. And Mr. William S. Stevens, in writing on "Unfair Competition", in June and September, 1914, mentioned and discussed, as instances of unfair competition, the four practices that Chief Justice White had characterized as "unfair methods of competition" in the *Standard Oil case* (221 U. S. 1, 43), as above quoted, together with seven other classes of practices of a similar character, to wit: maintenance of "fighting ships" and "fighting brands"; full line forcing, that is, compelling persons desirous of purchasing or leasing certain articles, to purchase or lease other and unwanted articles, as a condition of their obtaining the desired articles; exclusive purchase and sale arrangements; acquisition of exclusive or dominant control of machinery or goods used in manufacturing; manipulation; blacklists, boycotts, and whitelists; and coercion, threats, and intimidation. *Political Science Quarterly*, Vol. 29, pp. 282-306, 463-485, 490.

There is no reason to believe that Congress, when it enacted the Trade Commisison Act, used the term "unfair methods of competition" in such statute, in any other sense than that which, as above pointed out, had thereto-

fore been impressed upon such term, or with any intention of designating, by such term, any other practices than those that possessed the same general characteristics as the practices above noted. The use in interstate trade of practices of such sort constituted the recognized evil that gave rise to the enactment of such statute,—the evil that such statute was designed to cure.

Although not of crucial importance, it is perhaps worth observing that it appears to be not strictly accurate to say, as is said in the Commission's brief (p. 21), that "Both the House Bill and Senate Bill covered only 'unfair competition', and the words 'unfair methods of competition in commerce' were adopted in conference."

The genesis of the Trade Commission Act appears to have been that a bill (H. R. 15613) was first introduced in, and passed by, the House, and then sent to the Senate; that the Senate Committee on Interstate Commerce struck out all parts of H. R. 15613 following the enacting clause thereof, and substituted for the matter thus stricken out, the text of a bill (S. 4160) that had been previously introduced in the Senate; that the Senate subsequently adopted such substitute bill; that such substitute bill, containing the text of S. 4160, in lieu of the text of H. R. 15613, then went to conference; and that the conference managers then reported still another substitute bill, which was eventually adopted by both the House and the Senate (See *L. B. Silver Co.* v. *Federal Trade Commission* (1923), 289 Fed. 985, 993, 994, 996-997 (C. C. A. 6); Senate Reports, No. 597 of June 13, 1914, and No. 583 of June 24, 1914, and House Report No. 533 of April 14, 1914, 63d Cong., 2d Sess.).

However, the germ of what eventually became Section 5 of the Trade Commission Act, appeared in S. 4160, as

Section 5 thereof (Senate Report No. 597, *supra*, pages 3-4). And Section 5 of S. 4160 did contain the term "unfair methods of competition in commerce". It is true that such term did not appear in the first sentence of Section 5 of S. 4160, as it appears in the first sentence of Section 5 of the Trade Commission Act. The first sentence of S. 4160 was only "That *unfair competition* in commerce is hereby declared unlawful." But after thus first declaring "unfair competition" unlawful, Section 5 of S. 4160, in the next succeeding sentence, proceeded to declare that "The [Federal Trade] Commission is hereby empowered and directed to prevent corporations from using *unfair methods of competition in commerce*"; and in the sentence following next thereafter, the words "*unfair method of competition in commerce*" appear once, and the words "*method of competition*" appear twice.

The general characteristics of all of the practices to which the general term "unfair methods of competition" had come to be applied, long before the Trade Commission Act was enacted, were obvious. They were all injurious to competition, either as tending to lessen the market of the competitors of the tradesman that resorted to such practices, or to deprive such competitors of their customers and drive such competitors out of business or weaken their competitive strength, or as tending to curtail competition otherwise. In addition, all of such practices could aptly be described as "unfair", either because they were characterized by deception, bad faith, fraud, or oppression, and hence were repugnant to good morals; or because, if not immoral *per se*, they were of such nature inherently as not to be susceptible of use, without tending automatically to injure and destroy competitors and competition, *e. g.*, local price cutting.

Federal Trade Commission v. *Gratz* (1920), 253 U. S. 421, is understood to declare that the term, "unfair", as used in the Trade Commission Act, has substantially the signification above stated. In that case, Mr. Justice McReynolds, for the majority of the court, said, at page 427:

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

See, also, *Federal Trade Commission* v. *Raymond Bros-Clark Co.* (1924), 263 U. S. 565, 572.

An "unfair method of competition in commerce" may operate directly and immediately to hinder or suppress competition, as did the practice that was condemned in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (1922), 257 U. S. 441,—namely, a practice whereby a manufacturer maintained the resale prices of his products, and thereby prevented competition among dealers in its products. Or, an "unfair method of competition in commerce" may operate to suppress competition not directly and immediately, but only indirectly and mediately by and through injuring the trade of the competitors of the tradesman that uses such practice, and thereby rendering such competitors the less able to compete with such tradesman efficiently or at all. Such was the nature of the fraudulent practice that was condemned in *Federal*

Trade Commission v. *Winsted Hosiery Co.* (1922), 258 U. S. 483,—namely, the practice, on the part of a manufacturer, of fraudulently labeling or branding underwear, in such manner as to represent that it was made wholly of wool, when in truth it was made in part of cotton.

The theory upon which it is understood that the practice that was involved in the *Winsted Hosiery case* (258 U. S. 483), was held to be an "unfair method of competition in commerce", appears from the following language of Mr. Justice Brandeis, speaking for the majority of the court, at pages 493, 494:

> "The labels in question are literally false..... All are.....calculated to deceive and do in fact deceive a *substantial portion* of the purchasing public..... The facts show.....that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, *trade is diverted* from the producer of truthfully marked goods..... The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby *lessening the market* for the honest product."

As the *Winsted Hosiery case* (258 U. S. 483) is understood, the controlling facts therein were the "lessening the market" for, and hence the restraining of competition in, all-wool underwear and honestly branded cotton-and-wool underwear, by deception; the lessening of the competitive strength of honest manufacturers as competitors,

through injuring them financially by taking away their customers, by deception; and the circumstance that the lessening of the market, and of the competitive strength of the honest manufacturers, was "substantial", because the deception in question affected a "substantial portion" of the purchasing public,—which constituted the market, and the ultimate source from which the patronage and the money that were necessary to enable the honest manufacturers to survive, must be derived. Except for those facts, the decision in that case, it is understood, would have been the opposite of what it was—despite the fraudulent misbranding. And it was essential that the injury to competition should have been "substantial",—as appears from the observation in the *Klesner case* (280 U. S. 19, 28), "To justify filing a complaint the public interest must be specific and substantial."

As the *Gratz case* (253 U. S. 421),—the majority opinion in which is quoted, in part, hereinabove,—is understood, the reason that the majority of the court declined to sustain the Commission's order that was there under consideration, was that the Commission's complaint, upon which such order rested, failed to show that the practice that was there in question, either tended directly to suppress competition, or was indirectly injurious to competition through being injurious to the competitors of the persons that were being proceeded against; and that, therefore, such complaint failed to show that such practice was an "unfair method of competition in commerce", within the meaning of the Trade Commission Act, under the facts pleaded in the complaint.

The practice that was in question in the *Gratz case* (253 U. S. 421), was that of forcing purchasers who desired to buy steel ties for use in baling cotton, to buy also, as a condition of obtaining such ties, six yards of jute bagging—which also was used in baling cotton—for

every six ties purchased. Such practice was, in a degree, oppressive and coercive, and hence was susceptible of being reasonably regarded as "unfair"; it was a practice of the nature of the "full line forcing" and the "tying contracts", which—as had been brought to light in litigation under the Sherman Act, before the Trade Commission Act was adopted—had been found, by experience, to be efficient schemes for suppressing competition and creating or perpetuating monopoly.

But inasmuch as the Commission's complaint did not charge that the persons that were being proceeded against, who were using such practice, had a monopoly of either ties or bagging, or the ability, purpose, or intent to seek to acquire one, the majority of the court considered that such practice was not shown by the complaint to constitute, under the circumstances there set forth, "an unfair method of competition in commerce", within the meaning of the Trade Commisison Act.

Mr. Justice McReynolds, for the majority of the court, speaking of the complaint in the *Gratz case* (253 U. S. 421), said (p. 428): "The..... amount [of ties and bagging] controlled by them [the persons that were being proceeded against] is not stated; nor is it alleged that they held a monopoly of either ties or bagging, or had ability, purpose or intent to acquire one." And he concluded, "Nothing is alleged [in the complaint] which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint",—which is understood to mean that nothing was alleged in the complaint that tended to show that the practice in question had injured the public, through the working of an injury to competition, either directly, or indirectly through lessening the market for the products of competitors, or through weakening the competitive strength of any competitor by injuring him in his trade.

Mr. Justice Brandeis, with whom Justice Clarke concurred, in a dissenting opinion, considered that the propriety of the Commission's order in the *Gratz case* (253 U. S. 421) should be determined not with reference to the complaint alone, but with reference to the evidence also. And because the evidence showed that the principals of the persons that were being proceeded against, for whom such persons acted as agents in selling ties and bagging, were monopolistic concerns, Mr. Justice Brandeis considered that, therefore, an injury to competition had been done or threatened, and that the Commission's order should be upheld accordingly. In discussing the Trade Commission Act, he indicated that an "unfair method of competition in commerce" within the meaning of such statute, is a practice the "apprehended effect" of which is "suppressing competition by destroying rivals". His language was (pp. 441-442): "The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice, that the apprehended effect of an unfair method in *suppressing competition* by destroying rivals could be averted."

In *Federal Trade Commission* v. *Sinclair Refining Co.* (1923), 261 U. S. 463, Mr. Justice McReynolds, speaking for the court, used language that clearly showed that the purpose of the Trade Commission Act is only to protect competition and competitors. He there said, at page 476:

> "The great purpose of both statutes [the Trade Commission Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces [*i.e.*, competition] ordinarily engendered by an honest desire for gain."

In *Standard Oil Co.* v. *Federal Trade Commission* (1922), 282 Fed. 81, (C. C. A. 3),—affirmed (1923), 261 U. S. 463,—Judge Wooley, for the majority of the lower court, said at page 87:

> "Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize or attempt to monopolize', and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade' and 'restrict the common liberty to engage therein'..... Under the Federal Trade Commission Act declaring unfair methods of competition unlawful.....a loan of a curb-pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and accordingly was not, in our opinion, an unfair method of competition."

In *Philip Carey Mfg. Co.* v. *Federal Trade Commission* (1928), 29 Fed. (2d) 49, (C. C. A. 6), the Commission had issued an order forbidding the use, by those against whom it was proceeding, of any system of espionage for the purpose of obtaining information as to the facilities, capacities, operations or customers of competitors. Judge Moorman, for the majority of the court, said (p. 50) that

> "before the Commission was warranted in entering the espionage order, it was necessary that it find upon substantial evidence that the information was unlawfully used to *hinder or stifle competition*."

In *Kinney-Rome Co.* v. *Federal Trade Commission* (1921), 275 Fed. 665, (C. C. A. 7), Judge Page, for the court, said, in substance, that in order that there might be an "unfair method of competition in commerce", there must be, besides fraud, a lessening of competition—or, what comes to the same thing, an injury to a competitor—resulting from such fraud. His language was as follows, at pages 668, 669:

> "We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some fraud in trade that *injures a competitor, or lessens competition,* before it can be said that there has been used an 'unfair method of competition' (p. 668) . . . . . Unless that which petitioner [the manufacturer that was being proceeded against] did, fraudulently affected some competition in which either or both [*i. e.*, both the petitioning manufacturer and competing manufacturers] were interested, then the order to cease and desist was improvidently entered."

And again, in *Chicago Portrait Co.* v. *Federal Trade Commission* (1925), 4 Fed. (2d) 759, (C. C. A. 7), Judge Page, for the majority of the court, said at page 763:

> "From the forbidden acts [meaning, the acts that the Federal Trade Commission had forbidden in that case] there seems to us to be *no possibility of injury to competitors,* and we are of opinion that they are neither within the letter nor the spirit of the act."

The lower court, in the case at bar, is understood to have announced substantially the same conclusion as the one that is understood to have been reached in the decisions that are above noted,—namely, the conclusion that in order that a practice may be an "unfair method of

competition in commerce", within the meaning of the Trade Commission Act, such practice must be either directly injurious to competition, or indirectly injurious to competition through injuring competitors. Such—and nothing else—is understood to be the effect of the language that is quoted next hereinbelow, in part from the body of the lower court's opinion, and in part from a footnote appended thereto.

In the body of the lower court's opinion herein, Judge Denison said (R. 477-478):

> "In the *Silver case* [*L. B. Silver Co.* v. *Federal Trade Commission*] (289 Fed. 985) one member of the court [Judge Denison] took occasion (p. 992) to study the history of the creation and purposes of the Federal Trade Commission. The conclusion was reached that the commission came into being as an aid to the enforcement of the general governmental antitrust and antimonopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy. Since that opinion there has been no decision of the Supreme Court inconsistent therewith, nor any Circuit Court of Appeals decision which expressly denies that theory. Doubtless there have been opinions from these latter courts which are more or less inconsistent with its full acceptance; but the accuracy of the historical study then made has never, so far as we know, been particularly challenged, either by judicial opinion or in the periodical literature of the law. This court, as now constituted, is prepared to and does adopt the general view there stated, as to the foundation of the commission's jurisdiction. See also our opinion in *Beskey* [*Berkey*] *and Gay* v. *F. T. C.*, [42 Fed. (2d) 427] this day filed. The thing forbidden by the statute is *unfair competition*. This can not exist unless there is *competition*, and there can not be *competition* unless there is something to compete with. It must

be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. The first thought might be that the one invoking protection should be a particular trader; but the *Winsted case* (258 U. S. 483) teaches that protection will also be given under this statute to *the entire class of trade which is having its former customers taken away from it* by false representations that the competing goods are of the same descriptive qualities as those put out by the complaining class."

And in a footnote appended to the lower court's opinion, Judge Denison said (R. 477-478):

"Attention is drawn to the comment which the Supreme Court, in its opinion in *Federal Trade Commission* v. *Klesner* (280 U. S. 19, 26-7), made upon the *Beechnut case* and the *Winsted case*. The comment is that in neither case did the private right of any competing trader appear to have been invaded. As we noted in our opinion in the *Toledo Pipe-Threading Co. case* (11 Fed. (2d) 337, 343), the *Beechnut case* needed no evidence of unfair competition with any one. The practice involved and condemned was the price restriction policy. This had been expressly found illegal under the anti-trust act (*Miles Medical Co. case*, 220 U. S. 373), and expressly declared illegal by the Clayton Act. The whole ground of illegality of price restriction is that it *restrains competition between trade competitors*. To have considered this ground in making application to the *Beechnut case*, would have been supererogation. The opinion in the *Winsted case* expressly declares (p. 493): 'The practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear, who brand their product truth-

> fully, for when misbranded goods attract customers by means of fraud, which they perpetrate, trade is diverted from the producer of truthfully marked goods.' And again (p. 494) after finding that the public had an interest in stopping the practice as wrongful: 'And since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the commission was justified,' etc. It seems quite clear that the *Klesner opinion* in making reference to the *Beechnut case* and the *Winsted case* as not involving invasion of the private right of any trader competed against, intended to put the emphasis upon the right of a private or individual complaining competitor; and is not inconsistent with the necessity of injury to the class of 'honest manufacturers' who were named and directly protected in the *Winsted case,* and who were in the background in the *Beechnut case.*"

The study of the creation and purpose of the Federal Trade Commission, to which Judge Denison referred as above quoted, appears in Judge Denison's separate opinion, in *L. B. Silver Co.* v. *Federal Trade Commission* (1923), 289 Fed. 985, 993-998, (C. C. A. 6). No useful purpose would be subserved by attempting to summarize such study here; it should be read in its entirety.

The language that is above quoted from the lower court's opinion herein, coupled with what Judge Denison said in his study that appears in the *Silver case* (289 Fed. 985), furnishes the sole possible source from which the Commission could have derived the erroneous notion that is set forth in its brief (pp. 16, 19-20, 20-24),—namely, the notion that the lower court asserted, in its opinion in the case at bar, that "the Federal Trade Commission Act is limited to those situations indicating a substantial tendency to restraint of trade or monopoly

and to 'palming off' cases." (Commission's brief, p. 16.) Judge Denison's language that is quoted hereinabove from the opinion of the lower court in the case at bar, even when read in connection with what Judge Denison said in the *Silver case* (289 Fed. 985), will not bear—it is respectfully submitted—the interpretation that the Commission, in its brief, seeks to put upon such language. Such language, it is respectfully submitted says no more, and means no more, than that substantial injury of some kind—whether direct or indirect, and whether constituting an invasion of any private right, or not—either to competition or to competitors, is indispensable to the existence of an "unfair method of competition in commerce", within the meaning of the Trade Commission Act.

The foregoing considerations, it is respectfully submitted, establish that the publishing by respondent of the advertisements that are in question in the case at bar, cannot be held to have constituted the using by respondent of any "unfair method of competition in commerce", upon any other basis than that the publishing of such advertisements was substantially injurious to, and tended substantially to suppress, competition in the trade of selling antifat treatments in interstate commerce, either directly, or indirectly through the medium of weakening the competitive strength of respondent's competitors, if any, in such trade, either by unfairly lessening the market for the products of such competitors, or by unfairly depriving them of their actual or potential customers.

III.

THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" EXCLUDES PRACTICES THAT, ALTHOUGH INJURIOUS TO MEMBERS OF THE PURCHASING PUBLIC, DO NOT TEND SUBSTANTIALLY TO SUPPRESS COMPETITION.

From what has been said above,—to the effect that, in order that a competitive practice may be an "unfair method of competition in commerce" within the operation of the Trade Commission Act, it is essential that such practice should be "unfair", and that it should also be injurious to competition, either directly and immediately, or indirectly through the medium of injuring competitors, —it follows, as a corollary, that the term "unfair method of competition in commerce", necessarily excludes any and all fraudulent, oppressive, or otherwise unfair practices that are injurious only to members of the purchasing public alone, and are not injurious either to competition, or to the competitors of the tradesman that uses such practices.

Such corollary was formally stated by Judge Denison for the lower court, in the case at bar, in the language from the lower court's opinion that is quoted next hereinbelow; and such language did not go beyond the statement of such corollary. Judge Denison's words in that connection were (R. 478-479):

> "It is apparent from this record, as well as from other recent or pending cases in this court and other decisions of the Commission and from announcements by its members shown in this record,—that the Commission does not take this limited view of its jurisdiction [i.e., does not regard its power as limited to preventing only such fraudulent practices as are injurious to competition or competitors], but that it believes itself authorized to issue its 'desist and refrain' orders in any case where

it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that, in the judgment of the Commission, is injurious to the purchaser. The general law of unfair competition uses the misleading of the ultimate retail purchaser as *evidence* of the primarily vital fact,—injury to the lawful dealer; the Commission uses this ultimate, presumed injury to the final user as *itself* the vital fact. The result is a realization of what was suggested in the former opinion [in the case of *L. B. Silver Co.* v. *Federal Trade Commission*] as the opened vista (289 Fed. 992-3) and a *pro tanto* censorship by the Commission of all advertising. This particular case relates to medicine advertising, and of a class doubtless disapproved by the 'best people',—who can afford to employ good doctors; but that disapproval cannot create jurisdiction..... We have no occasion to deny, nor indeed, reason to doubt, that this elimination [i.e., the elimination of the respondent Raladam Company's proprietary medicine business, as being injurious to the health and purses of the persons purchasing respondent's Marmola tablets] would tend to the public good; but we cannot think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed 'pure fabric' law, and others of similar character, is familiar; but if the Commission's view of its jurisdiction is right, these laws are unnecessary." (Court's italics.)

Judge Denison's above quoted observation—as to "a realization of what was suggested in the former opinion as the opened vista (289 Fed. 992-3) and a *pro tanto* censorship by the Commission of all advertising"—has reference to what Judge Denison had said in his separate opinion in the *Silver case* (289 Fed. 985). In that case, the question was whether it constituted fraudulent advertising, and hence the using of an "unfair method of competition in commerce" within the meaning of the

Trade Commission Act, for a breeder of hogs to advertise that a kind of hogs that were called Ohio Improved Chesters or O. I. C. hogs, constituted a different *"breed"* from Chester White hogs,—the contention of the Federal Trade Commission being that, having regard for the science of genetics and the ancestral derivation of O. I. C. hogs, the requirement of truth was that O. I. C. hogs should be advertised as merely a separate *"strain"* of, and not a different *"breed"* from, Chester White hogs. And Judge Denison in that case said, in part, at pages 992-993:

> "In this matter, as in many others currently familiar, the Commission has adopted the theory that the 'unfair methods of competition' denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. The vista of business censorship seen through such an opening is limitless. It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred, for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics ..... I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations."

The adoption of any other view than the one that, as appears above, was adopted by the lower court in the case at bar,—namely, the view that the Federal Trade

Commission has no power to protect the purchasing public from injuries generally, or to protect it from any injuries except those that are also injuries to competition, or to competitors, in interstate trade,—would result in manifest absurdity.

If the term "unfair methods of competition in commerce", as used in the Trade Commission Act, should be construed as providing that—subject only to the condition that all proceedings instituted, and orders issued, by the Federal Trade Commission shall be "to the interest of the public"—the Commission is empowered to investigate, and to prevent, all practices in interstate trade that are injurious merely to the purchasing public alone, even though such practices are not injurious to competition in interstate trade, or to the competitors in interstate trade of the tradesman using such practices, it is manifest that such construction would be equivalent to declaring that the Commission is vested with power to police interstate trade generally. The public good—"the interest of the public"—is the object, and marks the limits, of the police power. To say that the Commission's power, in respect of protecting the public from injury in interstate trade, is not limited to the Commission's concerning itself only about injuries to competition and to competitors in such trade,—to say that the Commission's power extends to protecting the purchasing public from all injuries in interstate trade from which it is "to the interest of the public" that the purchasing public should be protected, regardless of whether such injuries to the purchasing public tend to suppress competition,—would be to vest general police power, in respect of interstate trade, in the Commission. That Congress intended to vest any such power in the Commission, can hardly be contended.

No authoritative decision has been discovered that is understood to countenance the view that the Federal Trade Commission has power to protect the members of the purchasing public from any injurious practices in interstate trade, unless such practices are also injurious to competition, or to the competitors of the person that resorts to such practices, in such trade.

The *Winsted Hosiery case* (258 U. S. 483), *supra,* is not understood to be any authority for the view that the Federal Trade Commission has power to prevent injurious practices in interstate trade, merely because they injure members of the purchasing public, apart from their being injurious, also, to competition, or to the competitors of the person that commits such injuries.

It is indeed true that in the *Winsted Hosiery case* (258 U. S. 483), the majority of the court said, of the false labels that were there in question, "All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public." But that observation is understood to have been made, merely by way of pointing out how an injury to the competitors of the concern that had used such false labels, and hence an injury to competition, had been brought about,—and not by way of declaring that any and every practice in interstate trade that is injurious to members of the purchasing public, is *ipso facto* an "unfair method of competition in commerce" within the operation of the Trade Commission Act, regardless of whether such practice is, or is not, injurious to interstate competition, either directly and immediately, or indirectly and mediately through its injurious effect upon competitors. What the majority of the court is understood to have declared in the *Winsted Hosiery case* (258 U. S. 483), is, in effect this: that a substantial injury to competition in interstate trade in all-wool underwear, and in honestly branded

cotton-and-wool underwear, had been shown to exist,—consisting of a lessening, by deception, of the market for all-wool underwear and for honestly branded cotton-and-wool underwear, and of a weakening of the competitive strength of honest manufacturers of such kinds of underwear; that the cause of such injury was that a substantial number of members of the purchasing public had been deceived and imposed upon by the false labeling of underwear that was made partly of cotton, as being made wholly of wool, and had thereby been induced to buy such underwear, when otherwise they would have bought either all-wool, or honestly branded cotton-and-wool underwear; and that, inasmuch as the Federal Trade Commission had power to prevent such injury to competition, it therefore had power to prevent the false labeling,—not independently of such injury, and not for the purpose (as either a primarily important or an ultimate end in itself) of protecting the public from being cheated, but solely by reason of the fact that the false labeling was the effectual producing cause of the injury. As the *Winsted Hosiery case* (258 U. S. 483) is understood, it was a mere adventitious incident—a by-product—of attaining the primary end and object of protecting competition, that the court prevented the fraud that was being practiced upon members of the purchasing public; and if the situation had been merely that members of the purchasing public were being defrauded, but that no injury was being worked therefrom either to competition, or to the competitors of the concern that was practicing the fraud, the court would not have sustained the Commission's order, just for the sake of protecting only the members of the purchasing public alone from fraud.

Federal Trade Commission v. *Sinclair Refining Co.* (1923), 261 U. S. 463, supports the view that injury to members of the public, apart from injury to competition,

does not properly concern the Commission. In that case, the contention was urged, in substance, that the practice, on the part of certain refiners and wholesalers of oil, of furnishing pumps to their retailers at a nominal rental, constituted an "unfair method of competition in commerce", in that, although such practice did not injure competition or competitors in the oil industry, it did injure manufacturers of pumps, by lessening the demand for pumps by retailers and so depriving the manufacturers of the opportunity of selling pumps that, except for such practice, they might have sold.

Mr. Justice McReynolds, for the court, referring to such contention, said at page 476:

> "The suggestion that the assailed practice is unfair because of its effect upon the sale of pumps by their makers is sterile and requires no serious discussion."

In the *Chicago Portrait Company's case* (4 Fed. (2d) 759, (C. C. A. 7), the opinion in which is quoted, in part, hereinabove, the Portrait Company had used a selling practice, whereby the purchasing public had been beguiled, by falsehood and trickery, into buying enlargements of photographs. The majority of the court characterized such practice as "reprehensible, and an unworthy device to be employed in trade." Judge Alschuler, in his dissenting opinion, characterized it as "a rather mild sort of fraud." The majority of the court considered, however, (Judge Alschuler dissenting), that such fraud "had no tendency to injure any competitor" of the Portrait Company; and the Commission's order that forbade the use of such practice, was accordingly vacated.

The foregoing considerations, it is respectfully submitted, establish that the Commission's order herein cannot be upheld, on any theory that, even though the

publishing of respondent's advertisements was not substantially injurious to competition, or to the respondent's competitors, if any, in the trade of selling antifat treatments in interstate commerce, nevertheless such advertisements were false and misleading, and the publication of them therefore did tend to mislead a substantial number of members of the public into buying and taking respondent's Marmola treatment, to the substantial injury of the purses and health of the persons that were misled; and that the Commission is possessed of power to issue an order, for the purpose of putting an end, in the public interest, to such supposed imposition upon such persons and others like them.

IV.

THE COMMISSION'S POWER IS LIMITED TO MAKING FINDINGS IN RESPECT OF QUESTIONS OF FACT, AND DOES NOT EXTEND TO DETERMINING EITHER DISPUTES AS TO MATTERS OF OPINION, OR QUESTIONS OF LAW.

The verbiage of Section 5 of the Trade Commission Act is sufficient, by itself, to establish that the Commission has no power to determine disputes as to matters of opinion. Such part of Section 5 provides that the Commission shall "state its findings as to the *facts*",—not its findings as to opinions; and that the "findings of the commission as to the *facts*",—not as to opinions,—"if supported by testimony, shall be conclusive." The Commission has not been made, in any degree, an arbiter of opinion,—whether in the field of therapeutics, or in any other field; and the Commission cannot subject any honest expression of opinion to the Commission's condemnation and inhibition, howsoever silly or even vicious such opinion may be deemed to be or may actually be, either by proceeding upon the fiction that the expression of such opinion constitutes an "unfair method of competition in commerce," or in any other manner.

What was said by the lower court in its opinion (R. 472-476), is sufficient to establish both that the representations that were made by respondent in and by its published advertisements, as to the safety and scientific character of its treatment, were mere expressions of opinion; and, also, that as expressions of opinion, they did not appear to embody opinions that were unsound or unsustainable, if the words *scientific* and *safe* were taken in a liberal, but wholly permissible, sense.

In addition, it may be observed that the Commission itself, by its counsel, in examining its witnesses as to whether respondent's treatment was scientific and could be safely self-administered internally, proceeded upon the assumption that such questions went to matters of mere opinion; in instances, the interrogatories that the Commission put to its witnesses were so phrased as, formally and in terms, to recognize that the matters that were being inquired about, were mere matters of opinion, and not matters of fact at all (*e. g.*, as to "scientific", R. 86, 190; and as to "safe", R. 84, 115-116, 187, 220).

Further, the whole controversy that was before the Commission, as to whether respondent's treatment could properly be advertised as scientific and safe, hinged upon the question of what were the therapeutic effect and properties of desiccated thyroid,—a question as to which the medical witnesses, who were in a position to know, expressed radically contradictory views, and for the determination of which there did not, and does not, exist any established external rule or standard of truth whatsoever.

The authorities clearly establish that a question of such character is purely one of opinion, and nothing else,—from which it necessarily follows that the dependent question of what is scientific and safe in respect of the self-administration of desiccated thyroid internally, cannot be other than a question of mere opinion.

In *School of Magnetic Healing* v. *McAnnulty* (1902), 187 U. S. 94, the question was as to the validity of a fraud order that had been issued by the Postmaster General, forbidding the delivery of mail to complainant. Such question turned upon the further question as to whether fraud could be predicated of a representation by the complainant, which was to the effect that complainant could cure people of their ills by a system of healing that was different from divine healing and from Christian Science, and was grounded upon the theory that the human mind is largely responsible for, and that a proper exercise of the brain and mind can cure, human physical ailments. It was held that such representation was as to a matter of mere opinion, and that fraud could not be predicated of it,—there being nothing to show that the complainant did not honestly entertain the belief that it expressed in its representation.

Justice Peckham, for the majority of the court, said at pages 104-105:

> "The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact. . . . . We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court."

And again Justice Peckham said, at page 105:

> "Suppose a person should assert that by the use of electricity alone, he could treat diseases as effica-

ciously and successfully as the same have heretofore been treated by 'regular' physicians. Would these statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation . . . . . ? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General . . . . . ? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General . . . . ."

After referring to the controversies that have existed between those that have favored and those that have opposed vaccination as a preventive of smallpox, and between the allopathic and the homeopathic schools of medicine, and saying that such controversies involved nothing but questions of opinion, Justice Peckham concluded, at page 107:

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it

is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes."

Bruce v. *United States* (1912), 202 Fed. 98, (C. C. A. 8), was a prosecution for using the mails to defraud. Defendants were charged with mailing advertisements that a remedy, called "Habitana", designed for self-administration, would cure the morphine habit. Such remedy contained morphine. The instructions that defendants supplied with the remedy, directed that the remedy be taken in progressively diminishing doses, until finally none at all would be taken. When a morphine addict arrived at the point where, after having followed instructions, he would not be taking any of the remedy at all, then he would be cured. Physicians testified that one way to cure morphinism is to give morphine in progressively diminishing doses until finally the morphine victim can get along without any of the drug. The view of such physicians was, however, that nobody afflicted with the morphine habit could cure himself by that method of treatment; that the will of a person having the morphine habit would be too weak to enable him to decrease progressively the dose of the drug, if self-administered; and that only by putting himself under the control of a physician, or a nurse, could he get a progressively decreasing dose of morphine. Therefore such physicians concluded that the representation by defendants in their advertising matter, to the effect that "Habitana", self-administered, would cure the mor-

phine habit, was a false representation. Obviously the view of the physicians, that one with the morphine habit would be too weak of will to reduce progressively the dose of morphine he was administering to himself,—upon which view they predicated their conclusion that Habitana could not truthfully be said to be a cure for the morphine habit,—was matter of mere opinion. Evidence was introduced to show that occasionally a morphine victim had not been so weak of will as to be unable to cure himself by progressively decreasing self-administered doses of the drug. The defendants asked that the jury be charged as follows: "The court charges the jury that whether the defendants are to be convicted . . . . . does not depend upon the opinion of the medical men that Habitana is not curative of morphinism; on the contrary, if the jury find from the evidence that whether 'Habitana' is remedial in character when exhibited as part of the treatment of morphinism, is merely a matter of opinion among medical men, the defendants must be acquitted. No conviction of fraudulent purpose can lawfully be based upon matters merely of opinion." The trial court declined to charge the jury as requested, and defendants were convicted. The reviewing court reversed the conviction, being of opinion that the requested charge should have been given to the jury.

In *Stunz* v. *United States.* (1928) 27 Fed. (2d) 575, (C. C. A. 8),—which otherwise has no apparent bearing upon the case at bar,—Judge Symes expressed a commonplace vividly in the following language, at pages 578-579:

> "Medicine is not an exact science. A respectable amount of authority can be cited to dispute the value of any well recognized method of treating disease . . . . . The so-called quack remedy of today may be hailed tomorrow as an absolute cure, and vice versa. Vaccination, for instance, is believed by a large ma-

jority of the medical profession and the public to prevent smallpox. Others, with equal sincerity, openly advocate the contrary view. When the white man and the Indian hunted deer together, and the meat divided up, the liver, discarded by the white man, was prized by the Indian for its medical properties. Today it is prescribed by the medical profession as a certain cure for pernicious anemia. Not many years ago the so-called Chinese herb doctors were prosecuted under this identical statute for representing that portions of dried fish—especially the head—were a cure for heart trouble. It is now established that adrenalin—which can be obtained from certain kinds of fish—is a powerful heart stimulant. Many other illustrations could be given—all to the point which we wish to emphasize—that a conviction in a case such as this must be bottomed on something more than conflicting opinion evidence."

The foregoing considerations and authorities sufficiently establish that the question of the therapeutic properties and effect of desiccated thyroid, and the dependent questions of whether respondent's Marmola treatment is scientific and can be safely self-administered internally, are questions of mere opinion.

The manner in which the Commission undertakes, in its brief (pp. 18, 34), to combat the conclusion that respondent's representations as to its treatment being scientific and safe, were mere expressions of opinion, is more entertaining than convincing. Thus the Commission says in its brief (p. 18): "Respondent advertised its remedy as safe, pleasant, and free from harmful consequences. Its unqualified statements were a representation that medical opinion was in agreement that the remedy could be safely taken, although this was a matter of sharp scientific and medical controversy. It represented the question of safety to be a fact when *it was mere opinion.*" Such reasoning is

hardly to be taken seriously; the fallacies in it are too numerous and too obvious. It may, however, be pointed out that the Commission's complaint did not charge that respondent had "represented the question of safety to be a fact when it was mere opinion",—whether falsely and fraudulently, or otherwise; and did not charge that respondent had represented—whether falsely and fraudulently, or otherwise—"that medical opinion was in agreement that the remedy could be safely taken."

Such questions as these:—namely, whether desiccated thyroid is a safe or a dangerous substance; in what manner such substance effects the results that it does effect; what is a safe dose of such substance, to be self-administered internally; what persons may, and what persons may not, safely take thyroid; whether the advice contained in the booklet that respondent supplied with its tablets, was sufficient reasonably to safeguard persons taking its tablets from injury; whether it is necessary that a person that contemplates taking thyroid, should first subject himself to a physical examination at the hands of a physician, and have his basal metabolic rate determined; whether a person taking thyroid should be under medical surveillance at all times, and have his basal metabolic rate determined from time to time; what is the value of a metabolic rate determination effected by a machine; whether the combination of ingredients that is found in respondent's tablets, is a good one, or not, medically considered; and other similar questions determinative of whether respondent's treatment was scientific and could be safely self-administered internally—are manifestly all questions of opinion, and nothing else.

The Commission has no power to determine whether any opinion is unsound, or as to which of two conflicting opinions is the sounder and better one. In the words of the lower court, speaking by Judge Denison (R. 476):

> "It [*i.e.*, "whether it is 'safe' for the public to buy and take Marmola"] is a matter of expert opinion, as to which there are as many shades and degrees as there are experts who discuss it, and as to which *a nonexpert board can hardly have been intended to be umpire.*"

The same consideration—that the Commission has no power to determine anything except questions of fact that can be resolved and supported by evidence—forbids that the Commission should determine the meaning of such words as *safe* and *scientific,* so as to bind the courts by the Commission's view as to the sense in which such words are used in any advertisement, or as to the sense in which they are understood by the persons to whom such advertisement is addressed. If a dispute arose as to the meaning of a word, which was of such a character that it could be resolved only by hearing evidence in that regard,—*e.g.*, a dispute as to the meaning of a technical term, or as to the meaning of a word in a particular locality, or among a special class of people, in which or among whom it was contended that the word had acquired a generally understood secondary signification,—perhaps a finding by the Commission in respect of such a dispute, if made after hearing evidence and if supported by substantial competent evidence, would bind the courts. But that is the limit of the Commission's power in respect of determining—for anybody except itself—the meaning of any word, or the sense in which such word is used in a given advertisement, or is understood by the readers of such advertisement.

As the lower court said, in substance, in the case at bar, the meaning of a word in general use,—such as the words *scientific* and *safe,*—which has no absolute meaning, such as is possessed by a technical term, and is not claimed to have acquired a secondary signification, is essentially

a question of opinion. Judge Denison's language in that regard was (R. 473, 473-474, 475):

> "It is clear that the adjectives 'scientific' and 'safe' have ordinarily no absolute meaning (R. 473) . . . . We think that it [*i.e.*, the question of whether respondent's treatment, "in the environment of these advertisements, is or is not 'scientific'"] was at the beginning of the proceeding and continued to the end to be a matter of opinion; and, in final analysis, a matter of *opinion as to what definition of the word* [scientific] *was more appropriate* to the circumstances. The same conclusions prevail in the matter of 'safety" (R. 473-474) . . . . . Any study of the evidence, however casual or however thorough, leads to and compels the conclusion that the whole subject of 'safety' stands upon the same basis as that of 'science'" (R. 475).

The same consideration—that the Commission has no power to determine anything except questions of fact—requires the conclusion that the Commission had no power to determine that the respondent had advertised its treatment as safe at all for self-administration internally. The determination that the respondent had so advertised its treatment, was essentially a determination of law, not of fact.

Such conclusion follows from the fact that the respondent had never made any express representation that its treatment could safely be self-administered internally; and from the further fact that the only representation that could be imputed to respondent at all, in respect of the safety of self-administering its treatment, arose by implication from respondent's advertising its treatment for sale, as one to be self-administered internally.

To deduce from the fact that a vendor advertises his product as one to be consumed by human beings, the

inference that, by so advertising, he thereby represents that it may be consumed, not only with some degree of safety, but with precisely what degree of safety, and by whom, and under what circumstances, is a deductive process that has an assertion of law for its major premise. It is not a direct and immediate inference from the bare words of the advertisement alone. And the Commission lacks power to make any binding deduction, or to draw any binding inference, that rests upon an assertion of law as its premise. The Commission, as a non-expert board, cannot declare, so as to bind anybody but itself, what are the implications of an advertisement, so far as they arise not alone out of the words used, considered in isolation from the law, but also out of the general rules of law that lie back of the advertisement. The determination of the legal effect of an advertisement—of what representations, and what representations only, an advertisement must be understood to make, not by reason of its express words alone, but also because the law is what it is—is for the courts exclusively.

The question of the power of the Commission to settle disputes as to matters of opinion, and to deduce conclusions as to the representations that are made by advertisements, when such conclusions rest upon premises of law, is not discussed explicitly in the Commission's brief. But perhaps the impression that is given by the brief as a whole, is that, in the Commission's view, if the Commission finds the statements in an advertisement to be false and misleading, that is the end of the matter, so far as the courts and everybody else are concerned,—regardless of whether such statements are not express but arise only by implication of law; and regardless, also, of whether such statements are false and misleading, not because they are fraudulent misrepresentations of facts, but merely because they embody opinions that the Com-

mission considers unsound and likely, if adopted, to lead the person adopting them to do things that the Commission believes will cause him to spend his money unwisely and to injure his health.

Such view, which the Commission appears to hold, it is respectfully submitted, is wholly untenable.

V.

IF THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" CAN, UNDER ANY CIRCUMSTANCES, INCLUDE THE PRACTICE OF PUBLISHING ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES,—WHICH IS DENIED,—SUCH TERM CANNOT INCLUDE SUCH PRACTICE UNLESS THE ADVERTISEMENTS PUBLISHED ARE NOT MERELY FALSE AND MISLEADING, BUT ARE FRAUDULENT.

It is urged in a succeeding division of this argument that—for reasons there stated—the publishing of advertisements in newspapers and magazines cannot fall within the term "unfair methods of competition in commerce", under any circumstances, regardless of the character of the advertisements, whether fraudulent or not.

But, howsoever that may be, it is here respectfully submitted that, at the very least, an advertisement must be fraudulent, before the publication of it can possibly be said to be an "unfair" competitive method. The making of statements that, although they are inaccurate and are made designedly and not inadvertently, nevertheless do not appear to have been made with any actual or imputable intent to deceive, does not constitute the using of any "unfair method of competition in commerce".

That advertisements must be more than just merely false and misleading, and must be fraudulent—characterized by bad faith and an intent to deceive—before the practice of publishing them can be an "unfair method of

competition in commerce", is the direct inference from the language that is quoted hereinabove from the *Gratz case* (253 U. S. 421),—to the effect that the words "unfair method of competition" in commerce are "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression", etc.

The misbranding that was involved in the *Winsted Hosiery case* (258 U. S. 483), was fraudulent; in the majority opinion, the misbranded product was characterized as an "*unlawful* instrument" and "*dishonest* goods" (p. 494), and reference was made to "the *fraud* which they [misbranded goods] perpetrate" (p. 493).

In *Sinclair Refining Co.* v. *Federal Trade Commission* (1921), 276 Fed. 686, (C. C. A. 7); affirmed (1923), 261 U. S. 463, Judge Page, for the lower court, said at pages 687, 688:

> "The jurisdiction under section 5 [of the Trade Commission Act] exists only where there are practices that amount to a *fraud* in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome case, supra* [275 Fed. 665], amount to an unfair method of competition . . . . . We are of opinion that Congress did not intend . . . . . to do more than to eliminate the almost infinite variety of *fraudulent practices* from business in interstate commerce."

The *Kinney-Rome case* (275 Fed. 665) is quoted hereinabove.

Fraud and perfidious dealing were, and still are, essential to the existence of "unfair competition", in the sense in which alone, prior to the adoption of the Trade Commission Act, the term "unfair competition" was com-

monly used in the law, *i.e.*, to designate "palming off" of one sort or another. *Elgin National Watch Co.* v. *Illinois Watch Co.* (1901), 179 U. S. 665, 674; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.* (1891), 138 U. S. 537, 549; *Queen Mfg. Co.* v. *Isaac Ginsberg & Bros.* (1928), 25 Fed. (2d) 284, 288 (C. C. A. 8).

It is not using any "unfair method of competition in commerce", to label or to advertise veneered furniture, merely as "mahogany" or as "walnut", without the use, as an accompanying qualifying term, of the word "veneered", or of some other word that would be adequate to indicate that such furniture was not made solidly and throughout of mahogany or walnut,—although the lack of some such modifying word might result in misleading grossly uninformed persons, but would not mislead the more enlightened. *Berkey & Gay Furniture Co.* v. *Federal Trade Commission* (1930) 42 Fed. (2d) 427, 430, (C. C. A. 6). Neither does it constitute using any "unfair method of competition in commerce", to use a subscription blank, of such character that it might mislead a very stupid person into erroneously believing that he was to pay for only certain articles that were mentioned in such blank, and was to get other articles mentioned therein free of charge, but would not mislead a person of ordinary intelligence into such erroneous belief. *John C. Winston Co.* v. *Federal Trade Commission* (1925), 3 Fed. (2d) 961, 962, (C. C. A. 3). Neither does it amount to using an "unfair method of competition in commerce", to make merely exaggerated statements concerning merchandise, even though they be greatly exaggerated and might mislead the credulous or the literal-minded, if they do not go so far as to misrepresent the real character of the merchandise, but are mere puffing statements. *Ostermoor Co. Inc.* v. *Federal Trade Commission* (1927), 16 Fed. (2d) 962, 963, (C. C. A. 2).

In view of the authorities above cited, it is respectfully submitted that advertisements must be fraudulent, and not merely innocently false and misleading, in order that publishing them may be deemed to be using any "unfair method of competition in commerce"; and that the fraudulent character of the advertisement must stand in a causal relationship, through deceiving and inducing the public to that substantial injury to competition, or to the competitors of the advertiser, which has been shown in a preceding division of this argument to be indispensable to a conclusion that any competitive act, howsoever reprehensible, may constitute an "unfair method of competition in commerce".

VI.

IF THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" CAN, UNDER ANY CIRCUMSTANCES, INCLUDE THE PRACTICE OF PUBLISHING ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES,—WHICH IS DENIED,—THEN THE ADVERTISEMENTS THAT RESPONDENT PUBLISHED DO NOT FALL WITHIN SUCH TERM, BECAUSE SUCH ADVERTISEMENTS (1) WERE NOT FRAUDULENT AND (2) THEY WERE NOT INJURIOUS TO COMPETITION, OR TO RESPONDENT'S COMPETITORS.

It has been shown, in preceding divisions of this argument, that if respondent's act in publishing advertisements in newspapers and magazines could, under any circumstances, constitute using an "unfair method of competition in commerce",—which is denied in a succeeding division of this argument,—such act on respondent's part could have such effect, if and only if two facts should coexist, namely: (1) that the advertisements that respondent published were fraudulent, and (2) that the publication of such advertisements was injurious, by reason alone of the fraudulent character of the advertisements, to competition, either directly, or indi-

rectly through the medium of injuring competitors whether by lessening their market, or by taking their customers away from them and thereby weakening their competitive strength, or by some other means.

It is respectfully submitted, both (1) that the advertisements that respondent published, were not fraudulent; and also (2) that the publication of such advertisements was not injurious to competition or to respondent's competitors.

(1) Respondent's advertisements were not fraudulent:

The two representations that were made by respondent in the case at bar, do not stand altogether upon the same footing, in certain particulars, so far as concerns the question of whether they were fraudulent or not.

The first of such representations—namely, the representation, in substance, that respondent's Marmola treatment for the reduction of excessive fat is scientific, at which representation the first three paragraphs of the Commission's order to cease and desist (R. 26-27) are leveled—was made expressly in respondent's advertising matter.

Such representation as respondent made in its advertisements, in respect of its treatment being scientific, are of small importance to respondent, and, it may be surmised, of small importance to the Commission, or anybody else. In the nature of things, it appears doubtful that respondent's advertising its treatment as scientific, ever contributed to the sale of a box of its tablets; and doubtful that respondent would ever miss selling a box of its tablets, as a result of its discontinuing—if it should discontinue—to advertise its treatment as scientific; and doubtful that the Commission would ever have instituted its proceeding, for the purpose only of forbidding that respondent should

advertise its treatment as scientific. The word *scientific* has been too much abused, for anybody to become very seriously concerned or surprised at, or deceived by, its being applied to anything,—as appears from the fact that it is not uncommon to hear, or even to read, that a pugilist either has, or lacks, "science" in his boxing. To think of a word that, in common usage, is more nearly meaningless than is *scientific,* would not be easy.

Such representation as respondent made in its advertisements as to its treatment being scientific, cannot, as a matter of law, properly be regarded as possessing the capability of being anything more reprehensible, at the worst, than an example of what was referred to in the *Ostermoor case* (16 Fed. (2d) 962, 963), *supra,* as "The time-honored custom of at least merely slight puffing", which, it was there said, "unlike the clear misrepresentation of the character of goods, ... has not come under the legal ban". Such representation cannot properly be regarded as fraudulent, under any circumstances.

Respondent never made expressly, in its published advertisements or otherwise, the second representation that the Commission charged respondent with having made, and found that respondent had made, by its advertisements,—namely a representation, in substance, that respondent's Marmola treatment, for the reduction of excessive fat, could be safely self-administered internally. It is against such supposed representation that the last three paragraphs of the Commission's order to cease and desist are directed (R. 26-27).

The only representation that respondent ever made that its treatment could be safely self-administered internally at all, was made by implication. The advertising by respondent of its Marmola tablets for internal administration, doubtless carried the implication that respondent's tablets could be self-administered internally, by somebody,

under some circumstances, with a degree of safety. But the fact that respondent advertised its tablets for internal administration, did not raise any implication, or justify any inference on anybody's part, that respondent's tablets —any more than corned beef and cabbage, or pork and beans—could be self-administered internally, with absolute safety, by everybody and anybody indiscriminately,—by the fat and the lean, the infant in arms and the centenarian, the sick and the well, alike,—in any and every quantity, under any and all circumstances.

Respondent's advertisements were addressed to the excessively fat (R. 425-435, and 388; Comm. Exs. 6, 7, 8, 9, R. 65 and 2; Comm. Ex. 9, R. 108 and 2; Comm. Exs. 10, 11, 12, R. 109-110 and 2). The implication of respondent's advertising its tablets for internal consumption did not go beyond a representation that respondent's tablets could be self-administered internally, in accordance with the instructions supplied by respondent in that behalf, with reasonable safety, under usual and ordinary conditions and circumstances, by the usual, ordinary, and average excessively fat person.

In accordance with the implication of its advertisements, respondent stated expressly, in the printed booklet of instructions that it supplied inside each retail package of its tablets (Comm. Exs. 2 and 3, D. 42-44, and 2; R. 417-424, and 388), that respondent's tablets were intended for the "average person" (R. 422), with the "average case" (R. 418, 422) of excessive fatness. And in such booklet respondent said, to the person contemplating the taking of respondent's tablets, "Consult your own physician if you want special advice in any unusual condition" (R. 422).

The lower court adopted, in substance, the view that is above set forth, as to the implied representation that respondent made by its published advertisements, in

respect of the safety of the self-administration internally of respondent's Marmola tablets. Thus Judge Denison said in that regard (R. 474, 475, 477):

> "The Raladam Company advertised that Marmola tablets were safe to take. It is difficult to see that the form of his [this] representation, so long as it is merely general, is of much importance. Within wide limits, there would be an implied assurance of safety in taking any food or drug placed on the general market; but the assurance, whether expressed or implied, would always need construction and could mean only, while kept in general terms, that if it were used reasonably, or in accordance with instructions, it would be reasonably safe (R. 474) .... people who have hyperthyroidism, or tuberculosis, or any other specified disease where thyroid extract would be contra-indicated, are not usually looking for obesity remedies; they are already too thin; the advertisement is not to or for them (R. 475) ..... The ..... results produced by too much thyroid are those which are generally called nervousness, including over-tension, loss of sleep, etc. Whenever these unusual conditions develop, the directions are to stop the treatment and consult a physician (475) ..... Petitioner says to the public, whether the statement happens to be in a printed form or orally, that this remedy is safe to be taken according to directions by the average person" (R. 477).

The Commission, in its brief (pp. 35-36), cavils at what the lower court thus said, in the next to the last sentence in the excerpt from the lower court's opinion that is just above quoted. The Commission's criticism—that the "directions" by respondent, to which the lower court referred as above quoted, did not explicitly direct that anybody who should develop symptoms of having taken too much thyroid, should stop taking Marmola tablets—is not entitled to be taken very seriously, in view of the fact that

the Commission's own witness (Dr. Elliott) testified, in substance, that the symptoms of over-dosage with thyroid are disagreeable, and that anybody that developed such symptoms would be likely to stop taking thyroid and go to a doctor about his symptoms, without being directed to do so (R. 98-99).

It is not, however, understood that the Commission seriously objects to the interpretation that the lower court put upon respondent's advertising matter, or to the limits which the lower court, as last above quoted, imposed upon the implied representation as to safety that was to be drawn from the respondent's having advertised its tablets for human consumption.

There is reason to believe that the Commission hardly expects this court to examine and interpret all of the respondent's advertisements that are shown by the evidence. In the "Supplemental Memorandum" that the Commission filed, in connection with its petition for certiorari, the Commission said (p. 1): "We submit that it is unnecessary for the court to examine the exhibits [where, alone, respondent's advertisements could be found (R. 2, 65, 108, 109-110, 388)]. They were introduced before the Federal Trade Commission to show what representations the respondent made in its advertisements. The nature of those representations cannot be disputed." The Commission, in its latest brief, appears to wish to get away from that statement in its "Supplemental Memorandum"; in its latest brief (e. g., at pages 37 to 38), the Commission appears to wish to discuss the truth or falsity of certain express representations in respondent's advertisements, of trivial importance to anybody, which the Commission did not even charge to be false in its complaint and did not even refer to in its findings. But it is believed that such course cannot properly be adopted.

Having regard for the foregoing considerations, the Commission's findings (R. 23) to the effect that respondent advertised that the "medical properties" of its Marmola treatment were "safe, pleasant and effective in their action in the removal of excess flesh from the human body" and that such treatment might "be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to the users thereof", must be taken to mean what the lower court took them to mean,—namely, that respondent impliedly advertised, by offering its treatment for sale, that its treatment could be self-administered, internally, by the class of persons to whom it was offered,—average excessively fat persons—with reasonable safety, under usual and ordinary conditions and circumstances. Otherwise, the Federal Trade Commission's findings must be regarded as not supported by any evidence at all. There is not a shred of evidence anywhere in the record that tends even remotely to support such findings, if they are taken to mean that respondent expressly advertised its tablets as safe at all, or that it impliedly advertised them sweepingly as intended to be taken, and safe to be taken, by everybody indiscriminately.

Taking the implied representation that was made by respondent by its advertisements, in respect of the safety of the self-administration of its tablets internally, as having been of only the limited scope that the lower court attributed to it,—namely, as having been, in substance, nothing more than a representation by respondent that its tablets could be self-administered internally, according to directions, by the average excessively fat person having an average case of excessive fatness, with reasonable safety, under usual and ordinary conditions and circumstances,—there is no substantial evidence in the record to show that such implied representation was even untrue, to say nothing of its having been fraudulent. The lower court

said, in substance, that there was not any substantial evidence to show, nor any finding, that the self-administration internally of respondent's tablets, by an average excessively fat person, would not be reasonably safe. Judge Denison's language in that regard was (R. 477):

> "Before leaving the subject of 'safety', it should be pointed out that there is no finding, nor any evidence, that any substantial part, or any particular part, of that public to which these statements are addressed, the obese public, the average or usual or ordinary obese person, would be reasonably likely to be harmed by the advised use of these tablets. The fair inference is that the actual harm would be occasional and rather exceptional. There is only the chance that the user may be of the exceptional class; upon that contingent basis rests the finding of general danger."

In this aspect of the record, the inescapable conclusion is that, so far as concerns the implied representation that was made by respondent in respect of the safety of self-administering its tablets internally, the Commission's finding (R. 24) that "Said statements and representations made by respondent in said . . . . . advertisements . . . . . have the tendency and capacity to mislead and deceive the purchasing public", etc., goes for nothing.

The foregoing considerations sufficiently establish that neither of the representations that are here in controversy, made by respondent, was fraudulent. And that conclusion is fortified by additional considerations, now to be noted.

Such additional considerations are, in brief substance, these: that, as has been shown in a preceding division of this argument, respondent's representations, made or implied in or by its published advertisements,—to the effect that its treatment was scientific and could be safely self-administered with reasonable safety by the excessively fat

under usual and ordinary conditions and circumstances,—, were representations as to matters of mere opinion; that an honest representation as to a matter of mere opinion, does not constitute using "any unfair method of competition in commerce", even though the opinion that is expressed in such representation be not generally accepted as sound by persons that ought to know, but be a dubious and debatable one; and that the making of a representation as to a matter of mere opinion cannot constitute fraud or the using of an "unfair method of competition in commerce", unless the evidence shows that such representation was dishonestly made, in that the representor did not honestly entertain or believe in the opinion that he expressed, but misrepresented his true state of mind when he stated that he did entertain such opinion; and that there is neither any charge, nor any evidence, nor any finding, in the record, to the effect that respondent did not honestly believe that its treatment was scientific and could be safely self-administered internally, or that respondent acted dishonestly, and misrepresented its real belief and true state of mind, when it made its representations to that effect.

L. B. Silver Co. v. *Federal Trade Commission* (1923), 289 Fed. 985, (C. C. A. 6), establishes that the publication in advertisements of honest expressions of opinion is not fraudulent, and does not constitute using any "unfair method of competition in commerce", within the meaning of the Trade Commission Act. The matter of opinion there in question was whether, having regard for their genealogy and for the science of genetics, a certain sort of hogs, known as Ohio Improved Chesters or O. I. C. hogs, could properly be termed a different "breed" of hogs from, or only a new "strain" of, Chester White hogs. The court declined to enforce the Commission's order that forbade advertising O. I. C. hogs as a separate breed.

Judge Donahue, for the majority of the court (Judge Denison concurring in a separate opinion), said at pages 988-989:

> "There is also a sharp and irreconcilable conflict in the expert opinion evidence touching the question as to what constitutes a distinct and separate breed . . . . . One group of experts and breeders are of the opinion that there cannot be a distinct breed originated where the blood line goes back to the old foundation stock; that, while different strains or types may be developed in this way, it is nevertheless the same breed. Another group of breeders and experts are of the opinion that a distinct breed may be originated through selection and in-and-in breeding. Each of the individual members of these groups that have testified in this case or whose books on live stock breeding have been admitted in evidence, though differing in opinion based on the same state of facts, appears to be entirely honest, sincere and equally firm in the belief that his conclusion is the right one. The situation presented by this conflict of opinion among experts and breeders is fully discussed and its effect determined by the Supreme Court in the case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 . . . . . It was also held by this court in the case of *Harrison* v. *U. S.* 200 Fed. 662, 665, 119 C. C. A. 78, 81, that *a scheme to defraud 'cannot be found in any mere expression of honest opinion'.*"

Seven Cases v. *United States* (1916), 239 U. S. 510, illustrates the only method by which the Commission can extend the power that it possesses in respect of preventing "unfair methods of competition in commerce," so as to enable it to suppress the expression in published advertisements of opinions of which it disapproves.

In *Seven Cases* v. *United States* (239 U. S. 510), the owner of certain proprietary medicine that had been

libeled, had branded or labeled such medicine so as thereby to represent that it would cure tuberculosis—an expression of opinion. Such owner had later admitted upon the record, by demurrer, that there was nothing that could be relied upon to cure tuberculosis. From such admission, it appeared that the owner could not honestly have held the opinion, at any time, that the medicine in question would cure tuberculosis; but that the owner had misrepresented his true state of mind,—a misrepresentation as to a matter of fact,—in expressing such opinion. The owner was held to have been guilty of fraudulently misbranding the medicine, Mr. Chief Justice (then Mr. Justice) Hughes saying, for the court, at pages 517-518:

> "It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements."

If the Commission should wish to make an effectual order commanding that a person being proceeded against should cease and desist from publishing in his advertisements any opinion of which the Commission disapproved, the course that is open to the Commission,—in the light of *Seven Cases* v. *United States* (239 U. S. 510),—and the only course that is open to it, would be for the Commission, first, to issue a complaint stating that such person had expressed such opinion, and that he had not actually and in fact believed in it, but had misrepresented his true state of mind in expressing it, and in representing that to be his opinion which in truth was not; and then next, for the Commission to find, as a fact, that the person being

proceeded against had misrepresented his true state of [illegible] as charged.

It is not, however, necessary to pursue this topic farther; because there is neither any charge nor any evidence that the respondent in the case at bar acted in bad faith, or dishonestly, or fraudulently in publishing in its advertisements its opinion to the effect that its Marmola treatment is scientific and is susceptible of being safely self-administered internally. There is neither any charge, nor any evidence, that respondent did not honestly entertain such opinion, or that it misrepresented its true state of mind when it expressed such opinion. And in that connection, Judge Denison, speaking for the lower court, said (R. 472):

> "There is, in the petition filed by the commission, no claim that the representations as to science and safety, were fraudulent and not made in good faith, or were so obviously and clearly unsound that they could not plausibly be held by any intelligent person. There being no issue as to fraud or bad faith, no proofs were taken on either side and such suggestions as are now made with that aspect must be disregarded."

And the lower court further said (R. 476), in substance, that under the pleadings and proofs, the case at bar was not within the doctrine of *Seven Cases* v. *United States* (239 U. S. 510), *supra*, and other cases of the same class. "We cannot see in these cases", said Judge Denison, "any particular bearing on the question here" (R. 476).

The Commission's brief appears not to be very explicit, upon the question of whether or not the Commission has power to suppress expressions of opinions in published advertisements, even though the opinions expressed are not fraudulent, in the sense illustrated by *Seven Cases* v.

United States (239 U. S. 510), but are merely, in the Commission's view, unsound and dangerous and likely to mislead members of the public into doing acts that the Commission thinks would not be good for them. It is perhaps a fair inference, however, that the Commission considers that it has such power. Such inference arises from the Commission's avoidance of the use of the word *fraud* in its brief; and from what is said on pages 38 and 39 of its brief; and from the frequent recurrence in the Commission's brief of expressions that are of the same import as the following, which appears at page 18 of the Commission's brief: "We submit that the real issue is whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public. The Commission found that they did have such tendency."

Some of the statements that are made in the Commission's brief (*e. g.*, at page 35), indeed suggest that, in the Commission's belief, the obligation of veracity that rests upon an advertiser is greater than that which rests even upon a witness under oath,—that an advertiser must tell the truth not only so far as he is interrogated, but to the full extent that he can ascertain what it is; and that if he knows that people disagree about the merit of his product, he must advertise that fact to the public, and may not put his best foot foremost by advertising only the view that is favorable to his product, notwithstanding that he honestly entertains such view, and that a large part of the people that are qualified to judge, agree with him.

Misleading and deceiving may, of course, be innocent; many persons consider that Darwin did engage, and that Einstein is now engaged, in misleading and deceiving the people of the world, to the great unhappiness of many of

them, and perhaps to the great financial loss of many useful institutions, about a matter that is of paramount importance to everybody,—namely, as to the true nature of things, with reference particularly to the origin and genesis of human beings and the finiteness or infiniteness of the universe.

It is not generally supposed, however, that Darwin did, or that Einstein does, act fraudulently in conceiving, developing, and putting forth their respective works. But the Commission appears, inferentially, to think that such consideration is a matter of no consequence; and that the Commission, if it should see fit, could issue an order that would be valid, commanding an interstate bookseller to cease and desist from advertising, if he should advertise, *The Origin of Species*, in newspapers and magazines of interstate circulation, as containing a true, veracious, and irrefutable explanation of the origin and genesis of mankind,—even if, by chance, the bookseller might actually believe that such was the real character of that book. Inferentially from the Commission's brief (p. 35) a bookseller could be prevented by the Commission—in the interest of avoiding any misleading or deceiving of the public—from saying more in an advertisement about such book, than that some think the book an expression of the truth, and some think it false; that some think it interesting and enlightening, and some think it dry, stale, and unprofitable; that it leads some people to a more zealous adherence to the book of Genesis, and turns others towards vitalism and other pagan notions; and that the bookseller cannot characterize the book, one way or the other, because he himself is without personal knowledge of whether it embodies the truth or merely the inspiration of the devil.

It is thought that the law is not that which the Commission inferentially appears to think it to be; that the

law is not that the Commission is empowered to shepherd the public and protect it from being misled and deceived,—or from what the Commission, in its wisdom, happens to believe is misleading and deceiving,—apart from all considerations of whether the misleading and deceiving is fraudulent or otherwise.

We think it not germane to consider whether respondent's published advertisements did, or did not, contain any false statements of fact,—as distinguished from expressions of opinion,—or to go outside the Commission's complaint (R. 2-6), its findings (R. 21-25), and its order (R. 26-27). The complaint, the findings, and the order do not cover, or purport to cover, the statements that are contained in the excerpts from the respondent's booklet that appear at pages 36 and 37 of the Commission's brief. We do respectfully submit, however, that the statement on page 37 of the Commission's brief,—that "The [lower] court unduly simplified the case when it referred only to the words 'safe' and 'scientific' ",—is not sustainable by the record. If anybody "unduly simplified the case", which is respectfully denied, it was the Commission, and not the lower court, that did it,—such simplification having been finally and fully accomplished by the Commission's order to cease and desist (R. 26-27), the first three paragraphs of which forbid respondent's predicating the attribute "scientific", of its treatment, and the last three, the attribute "safe".

The foregoing considerations, it is respectfully submitted, sufficiently establish that, as a matter of law, the representations that were made or implied by respondent's advertisements,—to the effect that its treatment was scientific and could be safely self-administered internally,—were not fraudulent; and that, therefore, the publishing of such advertisements did not constitute using any "unfair method of competition in commerce".

(2) Respondent's advertisements were not injurious to competition or competitors:

The Commission made a finding as follows (R. 22):

> "The respondent in the course and conduct of its business aforesaid, is in competition with other persons, partnerships or corporations in and throughout the several States of the United States, who are likewise engaged in offering for sale and selling printed professional advice, books of information and instruction, and other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body."

The Commission announced, as a conclusion (R. 25), that the publication of respondent's advertisements was "to the prejudice of the public and respondent's competitors".

The Commission however failed to adduce, and the record does not contain, any substantial evidence to support its above quoted finding. Neither is there any evidence to sustain its above mentioned conclusion, in its application to respondent's competitors; and whether there is any basis upon which to sustain its conclusion in its application to the public, will be considered in a subsequent division of this argument.

The lower court did not declare explicitly that the Commission's above quoted finding is not supported by any substantial evidence. The lower court did however say, in substance, that the question whether respondent had any competition or any competitors was "left very vague" by the evidence. Judge Denison's language in that regard, was (R. 479):

> "The other possible beneficiary is found in the list which the American Medical Association Bureau

> has made up, comprising a number of other commercially exploited remedies for obesity, which have been advertised or found in the drug stores within recent years. Some of them are *perhaps* still being sold in substantial quantities, though that is left *very vague.*"

As the decision in *Federal Trade Commission* v. *American Tobacco Co.* (1927), 274 U. S. 543, is understood, it is apprehended that this court will accept the view that was taken by the lower court, as to the dubious character of the evidence that is relied upon by the Commission to establish that respondent had competition and competitors. In the case last above cited, the Commission had charged, and had found, that the American Tobacco Company had become a party to a combination of tobacco dealers to maintain prices, but the Court of Appeals had considered that there was nothing to support that view.

Mr. Justice McReynolds, speaking for the court, said at page 544:

> "It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below."

It is respectfully submitted that if this court shall find it necessary to consider the question, this court will come to a conclusion, upon examining the record, that there is no substantial competent evidence to sustain a conclusion that respondent had any substantial competition in selling proprietary medicinal internal antifat treatments.

No competitor of respondent appeared before the Commission as a witness to complain that respondent's advertisements were injurious to him in his business, or injurious to competition in the field of antifat treatments; or to complain that such advertisements were fraudulent, or otherwise objectionable. The role of complaining witness, in the proceeding before the Commission, was occupied by Dr. Arthur J. Cramp (R. 110-113, 130-134, 159-170), who was given some assistance in seeking to establish that respondent had competitors, by Dr. Lyman F. Kebler (R. 183-184). Dr. Cramp, when he testified (on July 26th and July 27th, 1928), was the Director of the Bureau of Investigation of the American Medical Association (R. 111), and had his office with the American Medical Association (R. 110).

Dr. Cramp undertook to testify that respondent had competitors, and, on his first appearance as a witness (July 26th), read into the record a long list of such supposed competitors (R. 111-112, 130). He then testified, also, that he had recently theretofore purchased in drug stores in "The Loop" in Chicago, five different antifat treatments, other than respondent's, and that he could have purchased a sixth, if he had been willing to pay $6.00 for it (R. 112). Cross-examination developed, however, that Dr. Cramp had compiled the list that he had read into the record, from the files and records of the Bureau of Investigation of the American Medical Association (R. 130-131, 132), which makes a practice of searching newspapers, in large numbers, for advertisements of patent medicines and proprietary medicines (R. 165), and of writing letters, under assumed names, to proprietary medicine concerns as to the products of which it wishes to obtain information (R. 168). And cross-examination developed, further, that Dr. Cramp did not have any per

sonal knowledge that any of the many concerns that he had sworn were competitors of respondent, were in business at all at the time when he testified (R. 131-132, 167); and that he did not know how long the five antifat treatments that he had testified to having purchased, had been on the shelves of the respective drug stores from which he had purchased them, and that articles sometimes remained on the shelves of drug stores for years before being sold (R. 131, 132, 133, 165-166).

Dr. Cramp's first performance as a witness was, inferably, not satisfactory to the Commission. Dr. Cramp accordingly reappeared as a witness the next day (July 27th), in an effort to give some competent testimony that respondent had competitors (R. 159). He then testified, of his own knowledge, to the existence of three antifat treatments,—one put out by the O. B. C. T. Laboratories, which concern was very anxious to sell its product; the second, Venus Reducing Cream; and the third, Nature's Way Reducing Cream (R. 159, 160, 161). Those were the only ones, as to the then existence of which he had been able to obtain personal knowledge, in the course of twenty-four hours (R. 161). Also, Dr. Cramp then produced what purported to be advertisements that had been clipped from newspapers (R. 161), printed between February and May, 1928. Such clippings, Dr. Cramp testified had been sent in to the Bureau of Investigation of the American Medical Association,—one of them by the Boston Better Business Bureau (R. 163, 164). The source of origin of the others was left vague. Such purported advertisements related to what Dr. Cramp testified were antifat treatments, known respectively as Fayro, (R. 162); Kellogg's Rational Treatment for Obesity (R. 162, 160, 168); Rite-Wate Vegetable Compound (R. 162, 165-167); O'Slend'O (R. 162, 168); and Pyro-Pine Reducing Bath (R. 162-164).

Dr. Cramp did not testify as to the nature of any of the antifat treatments that he named, as to whether they were medicinal and intended to be used internally, or not. Two of them inferably, from their names, were salves; another, was a bath salt, and the remainder (except perhaps the Rite-Wate Vegetable Compound) were of a nature not indicated at all, by their respective names or otherwise. Nor did Dr. Cramp tell how, or wherein, he supposed that such treatments competed with respondent's treatment, or respondent's treatment with them, or any of them.

Dr. Kebler testified that the Kellogg treatment was a medicine; mentioned a treatment, called "Fat-off", as to which he said that he did not know whether it was being produced or not; and mentioned treatments called "Take-off", "Rite-Wate" (inferably the same one as to which Dr. Cramp had testified), and Dr. Newman's, respectively, which he said were being sold (R. 183-184).

The net result of the testimony of the two physicians appears to have been that of proving the existence of one medicinal antifat treatment, other than respondent's Marmola Treatment,—namely, Kellogg's Rational Treatment; and to prove the existence of another treatment, Rite-Wate Vegetable Compound, the medicinal character of which is possibly inferable from its name; and to show the existence of certain other treatments (aside from "creams" or salves), as to the nature of which, and as to whether they probably did or did not compete with respondent's treatment, the record supplies no information beyond what might serve as a basis for a pure guess.

Respondent's general manager (R. 32) testified, on July 24, 1928: "I do not know of any internal [obesity cures] selling through the trade at this time. There is some bath salts for the reduction of flesh" (R. 66). He testified,

further, that he had no knowledge that an institution at Battle Creek, run by Dr. Kellogg, sold any cure for obesity (R. 66-67); or that MacFadden sold advice for the reduction of flesh in the Physical Culture Magazine (R. 67); or that there were any mail-order concerns that were then selling antifat treatments (R. 67). He added: "There was a million of them some years ago, but I do not know where they are. There are people who have got machines, you know, peddling them for reducing flesh" (R. 67). And he testified further: "I had a lot of competition a few years ago. I have not any now. I say I have not any now. I have, but I do not know who they are..... That is, in taking internal—" [*i.e.*, competitors in vending medicinal treatments for internal administration] (R. 68).

There is not, it is believed, any other testimony than the foregoing, in the record, tending to show that respondent had any competitors. May such testimony be fairly said to be substantial evidence of the existence of any substantial—indeed, of any appreciable—competition, in the field of selling proprietary medicinal antifat treatments intended for self-administration? Does such testimony constitute an adequate basis upon which to predicate that injury to competition, or competitors, which, as has been seen, is indispensable to the existence of an "unfair method of competition in commerce"? May the Commission build up a case and destroy any business,—howsoever worthy of destruction such business may be deemed by some, or by many, to be,—on the basis of nothing more substantial, in the way of proof of competition and competitors to be protected against the use of "unfair methods of competition in commerce", than the testimony above noted?

The Commission, it is respectfully submitted, is asking the courts to stop the respondent from advertising its treatment as safe for self-administration internally otherwise than under medical surveillance, largely on a basis of guesswork.

The Commission produces no evidence that respondent's treatment ever injured anybody. It asks the courts to guess, first, that respondent's treatment is unsafe for self-administration, because five physicians say so,—notwithstanding that six say to the contrary.

The Commission asks the courts to guess next, that respondent's newspaper and magazine advertisements induced a number of persons—under the *Winsted Hosiery case* (258 U. S. 483, 493), it must have been a "substantial portion of the purchasing public", in order to be of any materiality—to buy respondent's treatment. There is not a shred of affirmative evidence that respondent's advertisements ever induced anybody to do anything,—whether to buy respondent's tablets, or merely to begin thinking about the advisability of getting rid of excessive fat in some way, or anything else.

To determine from the record whether respondent's advertisements ever had any effect at all, is wholly a matter of guessing. Persons with long and specialized experience in the advertising business, if supplied with full information as to fluctuations in respondent's sales and a history of the amount and different kinds of advertising that respondent had done from time to time, might perhaps be able to make an intelligent, expert guess, as to whether or not respondent's advertisements in newspapers and magazines had probably induced people to buy respondent's tablets, and possibly to guess approximately how many people such advertisements had probably so

induced. Nobody else could do better than to indulge in mere wild speculation about such question.

Why should not the Commission be required to make some kind of proof,—the best and most persuasive proof that can be applied to such an issue,—as to how many purchasers were probably induced to buy Marmola tablets by advertisements that were published in newspapers and magazines, and how many were induced to buy by other forms of advertising, or by other means than advertising? Why should the courts be asked just to guess blindly about that sort of a question?

The Commission next asks the courts to conclude, on the slender basis of the testimony above noted, that respondent had competition in the field of selling proprietary antifat treatments; and then to guess that such persons as the courts may surmise were induced, by respondent's advertisements in newspapers and magazines, to buy respondent's Marmola tablets, would otherwise,—except for such advertisements,—have bought some of the fat-removing agents that are mentioned in the above noted testimony, whether a medicinal treatment, or a fat-reducing machine, or what not, and that respondent's advertisements accordingly lessened the market for such articles and took away customers from the vendors of such articles.

The possibility that advertising respondent's treatment could possibly take patronage away from vendors of salves, bath salts, or machines appears to be remote. Such commodities are too unlike respondent's treatment.

The only shrewd guess, it is respectfully submitted, as to who were respondent's competitors, and whose market was lessened, and who if anybody lost patronage by reason of the publication of respondent's advertisements, is to surmise that physicians were the only real competitors

that respondent had, and that it was only the members of the medical profession alone, if anybody, that found their market lessened, and their patronage reduced, by reason of the publication of respondent's advertisements. Such conjecture accords with the activity as a witness, shown by the record, on the part of Dr. Cramp,—which can hardly be supposed to have been altogether altruistic; and with the complete lack of participation in any capacity, in the proceeding before the Commission, of any maker or vendor of any proprietary medicine, fat-reducing salve, bath salt, or fat-reducing machine.

It is superfluous to observe that the members of the medical profession, in practicing medicine, are not engaged in interstate commerce at all, and are not competitors of respondent in interstate commerce, and are not entitled to be protected by the Commission against "unfair methods of competition in commerce" on the part of respondent, or of other vendors of proprietary medicine, or of anybody else.

In the light of the foregoing considerations, it is respectfully submitted that because there is no substantial proof that respondent had any substantial competition, or any competitors,—as well as because, as shown above, the respondent's advertisements were not fraudulent—respondent must be held not to have been guilty of using "any unfair method of competition in commerce" in publishing such advertisements in newspapers and magazines.

VII.

THE PUBLICATION OF ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES CANNOT AT ALL, UNDER ANY CIRCUMSTANCES, CONSTITUTE THE USING OF ANY "UNFAIR METHOD OF COMPETITION IN COMMERCE".

This court never—so far as has been discovered—has expressed itself, directly and explicitly, upon the question whether the publication of advertisements in newspapers and magazines may, under any circumstances, constitute such an "unfair method of competition in commerce" as the Commission has power to prevent.

Perhaps a process of reasoning by analogy from the *Winsted Hosiery case* (258 U. S. 483), leads to a conclusion that, inasmuch as a practice of fraudulently misbranding merchandise was condemned in that case as an "unfair method of competition in commerce" that it was within the power of the Commission to prevent, therefore, a practice of fraudulently advertising merchandise in newspapers and magazines must also be such an "unfair method of competition in commerce" as lies within the scope of the Commission's regulative power.

Reasoning by analogy is often weak. Often there is no true analogy, but only a superficial appearance of one. And there are manifest points of possible fundamental difference between the respective practices of fraudulently misbranding merchandise, and fraudulently making false statements in newspaper and magazine advertisements concerning merchandise, so far as concerns the question of the right of the Government to exercise preventive control with reference to such practices respectively.

To permit the Federal Trade Commission to prevent fraudulent misbranding of merchandise is clearly not repugnant to the provision of the First Amendment that "Congress shall make no law.....abridging the freedom

of speech, or the press." But to permit the Commission to prevent fraudulent advertising in newspapers and magazines would seem to be repugnant to that provision of the Constitution,—as appears particularly, so far as concerns freedom of speech, from the considerations that are presented in the dissenting opinion in *Leach* v. *Carlile* (1922), 258 U. S. 138, 140-141.

Unless it be declared to be the law that the Commission has no power at all to prevent the publishing of any advertisements whatsoever—regardless of their character—in newspapers and magazines, the dangerous possibility of the Commission's interfering radically with freedom of speech, is obvious.

To perceive the dangerous possibility in that regard, all that is essential is to recall that the Commission is not subject to any restraint as to what complaints it shall issue, but that, given any situation in respect of which it could act at all, the Commission could file a complaint charging that the making in a newspaper or magazine advertisement of any statement whatsoever, of which the Commission disapproved,—even a statement of opinion, by regarding the doctrine of *Seven Cases* v. *United States* (239 U. S. 510),—constituted the using of an "unfair method of competition in commerce"; and to recall, further, that the Commission's findings, if supported by substantial evidence, are conclusively binding upon the courts,—which, would enable the Commission, if it could obtain any substantial evidence at all to support the charge contained in its complaint, to decide that its complaint had been proved, quite without regard to what the overwhelming weight of the evidence might be. What relief would be available to a person that had been injured by such an unscrupulous proceeding on the Commission's part,—if peradventure the Commission should ever act unscrupulously in such a way,—is not apparent.

Under the Constitution, the Government has no power to prevent the citizen from publishing fraudulent falsehoods in newspapers, if the citizen sees fit to publish them. The Constitution intends that the only deterrent to the publication of fraudulent falsehoods in newspapers shall lie in the risk that the publisher of such falsehoods incurs, that he may be compelled to answer in damages to any person that believes and relies upon such falsehoods, and is thereby induced to act, and does act, to his financial detriment.

Congress, it is respectfully submitted, never intended to give the Commission power to interfere in any degree with freedom of speech, whether in respect of the publication of newspaper and magazine advertisements, or in any other connection.

No expression is to be found in the lower court's opinion, in respect of the above point. But in respect of a somewhat narrower question—namely, whether the Commission's order in the case at bar is not repugnant to the First Amendment, as interfering with freedom of speech,—the lower court did say (R. 477):

> "Another contention should be noticed: Petitioner [the Raladam Company, respondent in this court] says to the public,—whether the statement happens to be in a printed form or orally,—that this remedy is safe to be taken according to directions by the average person; the Commission orders that the petitioner shall not make this statement unless modified in form to suit the Commission; that is, unless accompanied by the statement that it is safe only when medically supervised. Thereupon the court, acting as a court of equity, is asked to enjoin the publication. Petitioner contends that such injunction would be a violation of the First Amendment, and that its constitutional right to freedom of speech prevents such suppression. This contention is forcefully made, but we find it unnecessary to pass upon it."

Consideration of the restriction that appears in the Constitution in respect of abridging the freedom of the press, also requires—it is respectfully submitted—that the Commission should be declared to be without any power at all in respect of advertisements that are published in newspapers and magazines, whether such advertisements be fraudulent or not.

Doubtless out of deference to the provision of the Constitution, relating to the freedom of the press, the policy of Congress has always been, as far as has been discovered, to avoid adopting any measure that would, or might, lead to anything in the nature of the establishment of a press censorship.

As an illustration of such policy, reference may be made to the Food and Drugs Act (U. S. Code, Tit. 21, Secs. 7, 10, 11, 11a, 12). Such act gives the Department of Agriculture and the Department of Justice power to prevent the misbranding of foods and drugs; and doubtless it would have contributed to a more effectual suppression of the mischief at which such statute is directed, if Congress had empowered those departments to prevent the publication in newspapers or magazines of the same fraudulent statements, concerning foods and drugs, that such statute penalizes if and when such statements appear in the labels upon the foods and drugs themselves, or upon or in the packages containing them. But Congress did not seek to go that far, if it could, in the interest of efficiency in preventing the making of fraudulent representations concerning foods and drugs. It limited the operation of its inhibitions to that which had immediate physical relationship to the foods and drugs themselves.

As far as has been discovered, Congress does not appear ever to have sought to prevent any utterance, or the publication thereof, but has confined itself to punishing, or to preventing the circulation of, unlawful utterances. So far

as advertisements are concerned, Congress, as far as has been discovered, has not gone beyond providing, in substance, that advertisements concerning certain articles—as, for instance, advertisements of contraceptive or abortifacient drugs, or of obscene books or objects (U. S. Code, Tit. 18, Secs. 334, 396, 512)—shall not be circulated by use of the mails. And it would appear that rather strong reasons would have to exist, in order to justify a conclusion that Congress departed from its established policy, when it enacted the Trade Commission Act, and intended that such statute should be so construed and given effect as to enable the Commission to exercise a supervisory and preventive control, approximating to censorship, over what utterances an advertiser should make, or a publisher should publish, in newspapers and magazines.

If it should be contended that to construe the term "unfair methods of competition in commerce", as used in the Trade Commission Act, as extending to and including fraudulent advertising, would not give the Commission power to exercise a censorship over the advertising activities of newspapers and magazines, the reply is that the record in the case at bar supplies an empirical negation of such supposed contention. The record herein shows that, proceeding upon the assumption that the term "unfair methods of competition in commerce" includes fraudulent advertising, and upon the further assumption that power in the Commission to prevent "unfair methods of competition in commerce" embraces power to exercise control, in advance, to prevent the publication of fraudulent advertisements, the Commission has already established what amounts, in substance, to a very effectual censorship over the advertising columns of substantially all of the newspapers and magazines in the United States.

Thus, the record herein shows (R. 392-396, 400-404, 436-441), that on October 9, 1928,—while the Commission's proceeding against respondent was still pending before the Commission,—Hon. William E. Humphrey, the then Chairman of the Commission, purporting to act in his official character, made an address to the representatives of approximately 6000 publishers of newspapers and magazines, who were assembled in a "trade-practice conference".

The record does not show what a trade-practice conference is. But it may perhaps be a matter of which this court will deem it proper to take judicial notice, that a part of the Commission's "Rules of Practice and Procedure and Statements of Policy"—which particular part was adopted on April 30, 1925,—reads that, "The trade-practice conference affords, broadly stated, a means through which representatives of an industry voluntarily assemble, either at their own instance or that of the commission, but under the auspices of the latter, for the purpose of considering any unfair practices in their industry, and collectively agreeing upon and providing for their abandonment in cooperation with and with the support of the Commission." And an order—which, also, this court may perhaps think it proper to notice judicially—was entered by the Commission, on or about June 5, 1926, creating, within the Commission, a Division of Trade Practice Conferences and a Director of Trade Practice Conferences. Such order provides that such Director may call trade-practice conferences. The Government Printing Office has issued, for and in behalf of the Commission, several publications relating to trade-practice conferences, *e.g.*, "Trade Practice Submittals" (G. P. O., 1925); "Trade Practice Conferences" (G. P. O., March 15, 1928); "Trade Practice Conferences" (G. P. O., July 1, 1929).

Mr. Humphrey's above mentioned address contains internal evidence (R. 436, 437), that the newspaper and magazine publishers did not assemble in their trade-practice conference voluntarily, but at the instance and call of the Commission. In a report that was made by the Commission, dated November 12, 1928, relating to such trade-practice conference,—of which report, also, this court may consider that it can properly take judicial notice,—it is stated, "From the appearances entered, it is estimated that practically the entire periodical publishing field was represented, in person or through associations." A representative of a corporation named the National Better Business Bureau (R. 389), also was present at the conference (R. 436). According to the Commission's report, he "explained the mechanics of that organization"—the National Better Business Bureau—to the assembled publishers. Such report shows that the Chairman of the Federal Trade Commission presided over such conference, and that he was assisted by the Commission's Director of Trade Practice Conferences.

In the address (R. 436-441) that the Chairman of the Commission, Mr. Humphrey, made to the publishers' trade-practice conference, he told the assembled publishers, in substance, that the Federal Trade Commission, by virtue of its authority in respect of "unfair methods of competition in commerce", had a right, and the necessary power, to prevent the publication of fraudulent advertisements in newspapers and magazines; and that if the publishers should not take the precaution that the Commission considered that the publishers should take, in order to avoid publishing any advertisement that was fraudulent, then whenever any publisher published a fraudulent advertisement, the Commission, in the exercise of its statutory right and power, would institute a proceeding to prevent, by suit, the continued publication

of such fraudulent advertisement, and would join such publisher as a co-defendant in such proceeding, along with the advertiser for whom, and at whose request, such publisher had published such fraudulent advertisement.

The precaution that the assembled publishers agreed to take, and by a resolution that was adopted by the conference did take (R. 400-401),—with a view to avoiding the publishing of any fraudulent advertisement, and so saving themselves from the risk of being harrassed and annoyed by litigation instituted by the Commission,—was to bind themselves not to publish any advertisement that the National Better Business Bureau should deem fraudulent, and should accordingly forbid to be published.

The National Better Business Bureau regarded the adoption of such resolution by the publishers, as creating a "censorship of periodical publishers" (R. 403). It so stated, in effect, in a program or plan for suppressing fraudulent advertising, which it issued and distributed to periodical publishers throughout the country, in March, 1929 (R. 402-404).

The selection by the publishers of the National Better Business Bureau to act as a censor of advertising, can hardly be reasonably regarded as having been fortuitous, or otherwise than as having been dictated by the Commission.

The supposition that it was either purely by chance, or by their exercise of an unrestrained choice, that the publishers selected the Better Business Bureau to exercise censorship powers over their advertising columns, is negatived by the circumstance that the Commission had called, and was in charge of, the conference of the publishers, and that a representative of the National Better Business Bureau was present at the conference to explain

"the mechanics of such organization". It strains credulity to suppose that such representative's presence and activities at the conference were due to anything else than prearrangement between the Commission and the National Better Business Bureau, or were designed for any other purpose than that the National Better Business Bureau should be selected and empowered to act as censor of newspaper and magazine advertising.

The clear inference from the record is, not only that the selection of the National Better Business Bureau as censor was dictated to the publishers by the Commission, but also that the understanding was that the National Better Business Bureau should serve essentially as a mere screen or blind behind which, or as an instrumentality through which, the Commission itself should prescribe what advertisements should, and what should not, be published. The circumstances that sustain such inference,—in addition to the circumstance that it is only by presupposing the issuance of an invitation by the Commission, that the presence of a representative of the National Better Business Bureau at the publishers' trade-practice conference, can reasonably be accounted for,—are numerous.

Thus, the Commission (R. 401) approved and accepted the resolution of the publishers, whereby the latter had vested the National Better Business Bureau with censorship powers.

Again, the class of advertisements, in respect of which the National Better Business Bureau announced (R. 403-404) that it proposed first to exercise its censorship powers, was the same class of advertisements against which the Chairman of the Commission had long been issuing fulminations. In the address that Mr. Humphrey made to the assembled publishers, he said (R. 437-438):

> "The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country..... This class of advertisements takes its toll of millions annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope."

And in an address that Mr. Humphrey made on October 9, 1928, to the National Association of Purchasing Agents, he said, in part (R. 408):

> "The people of this country are annually robbed of hundreds of millions of dollars by false and misleading advertisements appearing in the newspapers and magazines. Some of the more glaring instances of this class of advertising might be cited:..... patent-medicine advertisements for incurable diseases, frequently injurious, never of any value, and often holding out false hopes, prevent the victim from seeking any real relief until too late;..... —all of them frauds and swindles, and perhaps the greatest of all just at the present moment are the various antifat remedies, appliances, soaps, belts, machines, powders and medicines, all of them fakes and all of them dishonest—and some of them dangerous."

In the same address, Mr. Humphrey indicated that he had been making addresses of like purport "For the last two years" (R. 408). And when the National Better Business Bureau issued its manifesto to the publishers in March, 1929, as to the class of advertisements in respect of which it intended first to exercise its powers as censor, it placed at the top of the list advertisements relating to "Medicinal drugs" of the "Fat reducing" class and of the "Glands" class (R. 403).

Moreover, there was the closest sort of cooperation between the National Better Business Bureau and the

Federal Trade Commission, in making effectual the exercise of the powers of censorship that had been ostensibly conferred upon only the National Better Business Bureau alone.

In such Bureau's proclamation of March, 1929, to the newspaper and magazine publishers (R. 403), the Bureau stated, in effect, that it would supply such information as it obtained concerning fraudulent advertisements, to the Federal Trade Commission; and that if any publisher should fail to make "satisfactory adjustment" in respect of advertising of a fraudulent character, the Bureau would present a formal complaint against such publisher to the Federal Trade Commission, because such action had been made incumbent upon the Bureau by the resolution that the publishers had adopted at their trade-practice conference. And the Bureau concluded that it was "desirable that the Federal Trade Commission cooperate with the periodical publishers and the Bureau to make the [censorship] agreement obtained at the trade-practice conference effective" (R. 403-404).

The record shows that the Federal Trade Commission did cooperate most actively, in order to make effectual the censorship that had been conferred ostensibly only upon the National Better Business Bureau alone.

On March 11, 1929,—about the time when the National Better Business Bureau issued its above mentioned proclamation to the periodical publishers, and before the Commission, on April 13, 1929 (R. 26), had issued against respondent its order to cease and desist—a publisher, in declining further to publish advertisements concerning respondent's Marmola treatment, wrote a letter in which such publisher stated, in substance, that it was being coerced into taking such position by the joint action of the National Better Business Bureau and the Federal Trade

Commission, acting co-operatively. "In view of recommendations of National Better Business Bureau and the Federal Trade Commission", wrote such publisher, "we can hardly do otherwise than to decline for the present, at least, to carry this [i.e., respondent's] advertising" (R. 404).

On April 8, 1929, another publisher, in refusing to publish advertisements relating to respondent's treatment, wrote in substance, by way of explaining such refusal, that it had been asked to appear, and had appeared by counsel, before the Commission, with reference to publishing advertisements concerning respondent's treatment; that, also, it had conferred as to that matter, with the Better Business Bureau; that it had been "given to understand that publishers accepting same [i. e., advertisements of respondent's treatment] may expect to face some difficulties in the near future"; and that it must accordingly decline to publish advertisements relating to respondent's treatment (R. 405).

On September 3, 1929, the same publisher, in repeating its refusal to publish advertisements of respondent's treatment, wrote by way of explanation that the Commission, recently theretofore, had sent out a bulletin that had contained a reference to such publisher that was not at all creditable, and that such publisher could not "afford to be made a defendant with too many advertisers in the suits instituted by the Federal Trade Commission" (R. 405-406).

The record contains other statements by publishers that tend to show that the Commission co-operated with the National Better Business Bureau to compel acquiescence on the part of the publishers in the exercise of the censorship powers that had been conferred ostensibly upon only such Bureau alone; and to show, also, that it was the

Commission's influence, rather than that of such Bureau, which compelled such acquiescence (R. 443, Ex. 4; R. 444, Ex. 7; R. 445, Ex. 9; R. 446, Ex. 10; R. 447, Ex. 12; R. 448, Ex. 13; R. 449, Ex. 15; R. 449-450, Ex. 16; R. 450, Ex. 17).

Further evidence that the Commission co-operated in, and was the real force in making effectual, the censorship that had been ostensibly vested in only the National Better Business Bureau alone, is found in a letter that Mr. Humphrey, the Chairman of the Commission, sent to the National Better Business Bureau on May 9, 1929, as follows (R. 406):

> "Replying to your communication with reference to Marmola [respondent's treatment], will say that it is my intention to file application for complaint against all publications that publish the advertisement of Marmola, unless they express an intention to discontinue it at once. You are at liberty to notify any of your publisher clients to this effect."

On May 16, 1929, the Commission's secretary sent the advertising agent that had charge of procuring the publication of respondent's advertisements—namely, Kling-Gibson Company—a notice to appear before the Commission and show cause why a complaint should not be issued against such agent, to compel it to desist from seeking further to procure the publication of respondent's advertisements (R. 441-442, 396-399). But when the Kling-Gibson Company gave evidence that it might not be easily imposed upon (R. 397-398), the Commission abandoned its effort to intimidate the Kling-Gibson Company.

The following month (June, 1929), the Southern Newspaper Publishers' Association and the American Newspaper Publishers' Association,—the respective membership lists of which embraced substantially all of the

newspaper publishers in the United States,—sent bulletins to all of their respective members, which substantially embodied the above quoted communication that the Commission's chairman had sent, for dessemination among publishers, to the National Better Business Bureau (R. 409-410).

Subsequently, on September 28, 1919,—which was after the respondent, Raladam Company, on May 16, 1929 (R. 385, 411), had filed its petition for review in the lower court,—the Commission by its Secretary, Hon. Otis B. Johnson, supplied to the Southern Newspaper Publishers' Association a further statement, which the latter sent to all of its members (R. 411, 412). Such statement was to the effect, in substance, that if any publisher should make publication of any advertisement concerning respondent's treatment, while respondent's petition for review was pending in the lower court, then, after the lower court had disposed of respondent's petition, the Commission would proceed against such publisher for having made such publication while respondent's petition was pending, unless the lower court, agreeably to the prayer of respondent's petition for review, should annul the Commission's order to cease and desist (R. 411).

The foregoing circumstances, it is respectfully submitted, fully sustain the assertion, made hereinabove, that the clear inference from the record is that, although the periodical publishers ostensibly vested censorship powers over fraudulent advertisements in only the National Better Business Bureau alone, the real effect of what the publishers did was to make the Commission the censor of fraudulent advertisements, and the National Better Business Bureau substantially only the catspaw of the Commission.

That the censorship, which the Commission brought into being and in effect exercised as above set forth, was highly effectual, appears abundantly from communications that appear in the record, whereby various publishers declined to publish advertisements relating to respondent's treatment, until after the question of the propriety of the Commission's having issued its order forbidding the publication of respondent's advertisements, had first been passed upon by the lower court (R. 404-406, 412-413, 443-451). Such censorship practically rendered it impossible for respondent to advertise its treatment at all (R. 412, 417), and nearly destroyed respondent's business altogether (R. 389, 416).

If it should be contended that the periodical publishers acted voluntarily in establishing the advertising censorship that came into being as above described, such contention could hardly be sustained. The circumstances that attended the genesis of such censorship, as above set forth, and the communications from publishers that are above referred to (R. 404-406, 412-413, 443-451), show that such censorship was imposed upon the periodical publishers against their will, and that the Commission engineered the creation of the censorship, and was the real and effectual—although screened—operator of the whole enterprise from the beginning.

The fundamental supposition upon which the entire censorship was brought into being and maintained, was that the term "unfair methods of competition in commerce", as used in the Trade Commission Act, embraces fraudulent advertising; and that because the Commission possesses power to institute proceedings, issue orders to cease and desist, and institute suits, in order to prevent the using of "unfair methods of competition in commerce", therefore it possesses power to institute pro-

ceedings, issue orders to cease and desist, and institute suits,—not only against tradesmen that seek to obtain the publication, but also against the publishers that make publication, of false advertisements,—to prevent false advertising. The truth of that assertion appears clearly, from noting what Mr. Humphrey said to the publishers that he had summoned to a trade-practice conference, when he sought to compel them to enter upon the censorship enterprise. His statements in that connection were in part as follows (R. 439, 440, 436, 437, 438, 440):

> "The law makes the publisher responsible for any false and misleading advertisements that he publishes (R. 439) . . . . . The presumption is always that no man knowingly violates the law. Therefore it is presumed that no publisher knowingly publishes false and misleading advertisements, which act is a violation of law (R. 440) . . . . . Whether or not any advertisement you accept is in fact fraudulent and misleading, is a matter for the [Federal Trade] Commission to decide" (R. 440).

> "I feel certain that we are going to have the earnest co-operation of practically every publisher in the country in our attempt to suppress fraudulent advertising (R. 436) . . . . . With the assistance of the honest publisher, false advertising can be practically eliminated. With the few dishonest and crooked who will not follow the judgment and wish of the majority, the commission will have to deal by proper action. As in all other industries, you have within your ranks those who violate the law (R. 437) . . . . The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country (R. 437-438) . . . . How can this gigantic evil of false advertising be suppressed? (R. 438) . . . . . What of the responsibility of the publisher? He becomes part of the plan. Without his assistance the consummation of the scheme would be impossible.

> Knowingly or unknowingly the publisher helps rob the unfortunate victim. He brings the victim and the crook together. He shares in the ill-gotten gains. In publishing such advertisement the publisher is violating the law. He is guilty of an unfair practice. In a suit by the Federal Trade Commission to suppress such advertising the publisher is not only a proper party, but under recent decisions he is a necessary party. The commission, as a public duty that it is under every obligation to perform, should make the publisher a party to all suits against fraudulent advertising by publication. These facts in regard to their responsibility seem not to be generally understood by the publishers. This is the outstanding reason why the commission has called this conference (R. 438) . . . . . I think you can now understand the reasons why the commission . . . . . asked the publishers of the country to voluntarily clean their own house, instead of the commission bringing numberless suits to compel such action (R. 438) . . . . . We . . . . . do not desire to involve any business in litigation if it can be avoided (R. 438) . . . . . But in an action brought against the publisher and the advertiser charging them with false and misleading advertising, the publisher who shows that he used reasonable care to ascertain the truth will find the discretion of the commission exercised in his favor when it comes to taking final action in the matter. In other words, while the law may require that the publisher shall be made a party to such action, the commission in its discretion will see that the honest publisher receives the consideration to which he is entitled" (R. 440).

The part of the record that has been examined above, is the part which Judge Denison appears to have had in mind when, in his opinion in the lower court, he said (R. 479):

"The Better Business Bureaus explain to their local newspapers and to the general periodicals that it would be wise to refuse this advertising. The chairman of the Commission, in public addresses, and in correspondence, advises the newspapers that they will be subject to prosecution by the Commission as defendants, to be joined with the advertisers, if they do not desist from such publications; and the newspapers may suspect that if they do not comply with the advice of the Better Business Bureaus their general advertising patronage from the membership of these bureaus will fall off. It appears that these methods of influence, carried on in this case before this cross suit for enforcement [meaning, the Commission's demand, asserted in and by a cross bill which it filed in the lower court as part of its answer (R. 385) to respondent's petition for review (R. 373), praying that its order to cease and desist, issued against respondent, be enforced] was commenced and while it has been pending, have destroyed a large part of petitioner's business [i.e., the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete."

However, against the contention that, out of consideration for preserving freedom of speech and of the press, the term "unfair methods of competition in commeree", as used in the Trade Commission Act, should be construed as above suggested,—so as to exclude fraudulent advertising in newspapers and magazines,—there stands the fact that several of the Courts of Appeals have, apparently without question, construed the term "unfair methods of competition in commerce", as embracing fraudulent advertising. But it does not appear that the propriety of so construing such term was challenged, in any case in any of the Courts of Appeals.

In some of the cases in which the practice of fraudulent advertising appears to have been regarded as constituting an "unfair method of competition in commerce", it is not possible to determine certainly, from the reports, whether the advertising involved was newspaper or magazine advertising, or some other kind of advertising; it is probably fair to surmise, however, at least in most of such cases, that it was newspaper or magazine advertising that was involved.

In other cases, a determination of the question of whether the term "unfair methods of competition in commerce" could be construed, consistently with the Constitution, as embracing fraudulent advertising, was not necessary to a disposition of the controversy involved. Thus, in some of such cases, fraudulent advertising did not stand alone, but was accompanied by some other fraudulent or oppressive practice; and such cases might have been decided precisely as they were in fact decided, if the element of fraudulent advertising had been wholly lacking. Thus, fraudulent advertising was combined with a disparaging of competitors, in *Sears, Roebuck & Co.* v. *Federal Trade Commission* (1919), 258 Fed. 307, (C. C. A. 7); with palming off, in *Fox Film Corporation* v. *Federal Trade Commission* (1924), 296 Fed. 353, (C. C. A. 2) and *Federal Trade Commission* v. *Balmé* (1928), 23 Fed. (2d) 615, (C. C. A. 2), in which *certiorari* was denied (277 U. S. 598); with misbranding, in *Proctor & Gamble Co.* v. *Federal Trade Commission* (1926), 11 Fed. (2d) 47, (C. C. A. 6), in which *certiorari* was denied (273 U. S. 717, 718); and with both misbranding and palming off, in *Royal Baking Powder Co.* v. *Federal Trade Commission* (1922), 281 Fed. 744 (C. C. A. 2), in *Masland Duraleather Co.* v. *Federal Trade Commission* (1929), 34 Fed. (2d) 733, (C. C. A. 3), in *Federal Trade Commission* v. *Kay* (1929), 35 Fed. (2d) 160, (C. C. A. 7),—in which *certiorari* was denied (281

U. S. 764),—and in *Lighthouse Rug Co.* v. *Federal Trade Commission* (1929), 35 Fed. (2d) 162, (C. C. A. 7).

In a case in which, as in the *Silver case* (289 Fed. 985), the court considers that the advertising that is attacked as fraudulent, is not fraudulent, it is, of course, not necessary to the disposition of the controversy before the court, that the court should decide whether the term "unfair methods of competition in commerce", when construed agreeably to the Constitution, includes or excludes fraudulent advertising.

There are, however, still other cases, in which no other alleged "unfair method of competition in commerce" than fraudulent advertising appears to have been involved, and the advertising that was in controversy was deemed fraudulent. And such cases could not have been disposed of as they were, unless the courts either decided silently that the term "unfair methods of competition in commerce", when properly construed, with reference to the Constitution, does include fraudulent advertising, or ignored such question altogether. *Guarantee Veterinary Co.* v. *Federal Trade Commission* (1922), 285 Fed. 853, (C. C. A. 2); *Federal Trade Commission* v. *Pure Silk Hosiery Mills, Inc.* (1925), 3 Fed. (2d) 105, (C. C. A. 7); *Indiana Quartered Oak Co.* v. *Federal Trade Commission* (1928), 26 Fed. (2d) 340, (C. C. A. 2), in which *certiorari* was denied (278 U. S. 245).

The cases above noted are not all of the cases involving fraudulent advertising that have been decided by the Courts of Appeals, but they are illustrative of all of the different kinds of cases that have been observed.

It is respectfully submitted that it is utterly inconsistent with freedom of speech and of the press, that the Commission should have power to issue a preventive order

forbidding the publication in newspaper and magazine advertisements of any statement whatsoever, whether fraudulent or not; and that therefore the term "unfair methods of competition in commerce" should be construed as excluding the publishing of newspaper and magazine advertisements altogether, whatsoever their character.

VIII.

INASMUCH AS THE POWER OF THE COMMISSION IS LIMITED TO INTERSTATE COMMERCE, THE COMMISSION HAD NO LAWFUL POWER TO DESTROY RESPONDENT'S BUSINESS, FOR THE BENEFIT OF THE MEDICAL PROFESSION,—WHICH WAS THE REAL, AS DISTINGUISHED FROM THE AVOWED, PURPOSE OF THE COMMISSION'S PROCEEDING AND ORDER AGAINST RESPONDENT.

The Commission can hardly contend seriously that it has any power to protect physicians,—who, in practicing their profession, are not engaged in interstate commerce at all,—from "unfair methods of competition in commerce" on anybody's part.

It was said by the lower court, by Judge Denison (R. 479):

> "When we search this record to find the legitimate activities which are to be protected against this unfair competition [i.e., the unfair competition that the Commission had charged against respondent] we observe only two such possible beneficiaries. One is the medical profession. It can not be seriously contended that the act was intended to protect any profession against encroachment; the aid of the Commission might be as logically given to physicians and surgeons as against chiropractors, or to lawyers as against incompetent will-draftsmen."

The courts are not obliged to accept the Commission's assertion as to what purpose the Commission holds in

view in instituting any proceeding, or issuing any order to cease and desist. The courts are at liberty to discern and to declare, and to act in respect of, what the record discloses to be the real, as distinguished from the avowed, purpose of any proceeding or order on the Commission's part. The courts are not obliged to stand by and acquiesce in a perversion by the Commission of its powers and authority.

In *Sinclair Refining Co.* v. *Federal Trade Commission* (1921), 276 Fed. 686, (C. C. A. 7),—affirmed (1923), 261 U. S. 463,—the Commission's order purported to be directed only to forbidding that the Refining Company should supply pumps to retail distributors of its oil, at a lower rental for such pumps than would yield the Refining Company a reasonable direct profit; and to forbidding that the Refining Company should require such retail distributors to use such pumps for storing or dispensing only such oil as was supplied by the Refining Company, and not by any other concern. The lower court did not hesitate to perceive and to declare, in substance (p. 689), that the real purpose of the Commission's order was not either of those that were declared therein; but that the Commission's real purpose was rather to forbid that the Refining Company should resort at all to a competitive practice—namely, the supplying of oil pumps to retailers—that cost so much money in its execution, as thereby to lie altogether beyond the financial reach of many of the Refining Company's competitors. And the Commission's order was set aside accordingly.

The Commission cannot be permitted to accomplish, by fiction, subterfuge, and indirection, that which it may not lawfully do openly and directly. As was shown in a preceding division of this argument, the record does not contain any substantial competent evidence that tends to show that respondent had any substan-

tial competition, or any real competitors, in the field of selling, in interstate commerce, proprietary medicinal antifat treatments for internal self-administration. In the light of the evidence in the record, and of the attitude of Mr. Humphrey, the Commission's chairman, towards vendors of proprietary antifat treatments (as shown by the record, and noted hereinabove), the protection of such vendors from the use of any "unfair method of competition in commerce" on respondent's part, cannot reasonably be regarded as the real object and purpose of the Commission's proceeding and order against respondent. The only persons whom the Commission can reasonably be regarded as having held in view, as deserving protection, or as having been intended to be protected, against the competition offered by respondent, were and are the members of the medical profession. They could best be protected by the destruction of respondent's business altogether. Indeed they could hardly be protected at all, otherwise. And the record justifies the conclusion that the destruction of respondent's business, rather than the regulation of respondent's competitive acts and practices, is what the Commission set out to acomplish, and tried to accomplish, by the proceeding and order that are now before the court.

The first three paragraphs of the Commission's order (R. 26),—namely, those that forbid that respondent should advertise its treatment as scientific,—are of small importance. Those paragraphs are properly to be regarded as mere make-weight provisions,—directed at something of relatively small importance to anybody, that could not be regarded, under any circumstances, as anything more reprehensible than mere puffing.

But the last three paragraphs of the Commission's order (R. 26-27),—namely, those that forbid that respondent should advertise that its treatment is susceptible of

being self-administered internally, with safety,—are of a different character.

As noted before, the respondent does not, in its advertisements or otherwise, make any express representation as to the safety of the self-administration of its treatment. The representation as to safety arises, and is made only, by implication, from the fact that respondent advertises its tablets as intended to be taken internally. And, as noted before, such implied representation is only that respondent's tablets may be taken by the average excessively fat person, with an average case of excessive fatness, with reasonable safety, under usual and ordinary conditions and circumstances.

Neither respondent's business, nor any other business, can be carried on successfully, unless the commodity offered for sale in such business can be advertised,—and advertised in newspapers and magazines, as well as by other means. And if the Commission had entered an order that went no farther than merely to require that the respondent should not, by its advertisements, raise the above stated implication of safety, unqualifiedly; if the Commission had entered an order that left it open to the respondent to choose what qualifying statements, consistent with the truth, it would insert in its advertisements, by way of limiting and modifying the general implication of reasonable safety that must necessarily arise out of, and attend, its advertising its treatment for internal administration at all,—the situation that would have been created by such supposed order on the Commission's part, conceivably might not have been completely destructive of all possibility of respondent's continuing to advertise its treatment, and so to continue carrying on its business, in some fashion. Conceivably, in such case, respondent might have been able to devise some qualifying statements, consistent with the truth, that it could have inserted

in its advertisements, so as thereby to be able to continue advertising its tablets, and thereby to continue its business, under such supposed order.

Such possibility, however, the order that was actually entered by the Commission appears plainly to have been specially devised to destroy. Such order leaves respondent no opportunity to seek for limiting, qualifying statements, such as, if inserted in its advertisements, would or might render its advertisements unobjectionable, and so enable respondent to go on doing business. The order that the Commission actually entered, specifies what single statement alone respondent may insert in its advertisements, by way of limiting the implication, which arises out of respondent's advertising its treatment for internal administration, that its treatment may be safely self-administered internally; and such single statement is, in substance (R. 26-27), a statement—a notice to the public—that respondent's treatment cannot be safely self-administered at all, except under the advice and direction of competent medical authority.

The presence in the Commission's order of the requirement that if respondent would advertise its treatment at all, it must advertise that such treatment cannot be safely self-administered except under medical surveillance, is the feature of the order that unmasks the real ultimate purpose of the order,—the purpose to prevent respondent from carrying on its business at all, and to destroy respondent's business altogether, in the interest of the medical profession.

Exposition can hardly be required to make plain that the Commission's order substantially forbids that respondent shall advertise its treatment at all, with any effect, or with any likelihood that advertising its treatment will result in sales thereof; and, hence, that such order sub-

stantially forbids that respondent shall continue its business at all. From the standpoint of rendering sales impossible, and of thereby destroying a proprietary medicine business, there is no perceptible practical difference between saying to a vendor of a proprietary medicine, "You shall not advertise your product for sale at all", and saying to him, "You may advertise your product for sale, provided that your warn people that they may not safely consume your product after they shall have purchased it, unless they shall first employ a competent physician and shall consume it under his direction and control." The likelihood of anybody's purchasing a treatment, after having been warned in advance, by the vendor thereof, that anybody purchasing such treatment may not safely use it, unless he shall first put himself in the hands of some member of the medical profession, is so exceedingly speculative and remote as to be negligible for all practical purposes.

Likewise, exposition can hardly be necessary in order to make plain that the Commission intended that the destruction of respondent's business, at which the Commission's order aimed at above noted, should be for the benefit of the medical profession, and not for the benefit of respondent's competitors, if any, in the field of selling, in interstate commerce, proprietary medicinal antifat treatments for self-administration internally.

The inescapable inference that the medical profession, and nobody else, was intended to be the beneficiary of the Commission's order, does not arise only from the terms of the order alone, and from the express mention of "competent medical authority" therein. Such inference arises also from the consideration that—even upon the assumption that respondent's advertisements were fraudulent, which, as has been shown, they were not—some other requirement than the one, which is imposed

by the Commission's order, that respondent's advertisements should inform all purchasers of its treatment that they should betake themselves to members of the medical profession for direction and advice, not only would have fully sufficed for the protection, but also would have been more protective, of all of respondent's competitors, if any, in the field of selling proprietary medicinal antifat treatments, in the field of interstate commerce. If the respondent should advertise its treatment, as commanded by the Commission, as unsafe to be taken except under medical surveillance, the natural effect would be to make the public believe that it was true,—or make it pause and consider whether it might not be true,—that no other proprietary medicinal antifat treatment could be taken safely, except under medical surveillance, either. For respondent to create such an impression upon the public, would be injurious to, not protective of, respondent's competitors, if any, in selling proprietary medicinal antifat treatments.

The conclusion is unavoidable that if the Commission had intended to accomplish nothing more than the protection of such competitors of respondent, if any, against being injured by respondent's advertisements, the Commission would have left it to respondent's ingenuity to devise what statement or statements, consistent with the truth, respondent would add to its advertisements, for the purpose of thereby modifying and limiting the implication of safety raised by its advertisements. That respondent could have done readily. It could have added to its advertisements statements that would have tended to bring respondent's advertisements into line with the testimony of the Commission's medical witnesses in all reasonable respects,—such statements, for instance, as that Marmola tablets were not intended for excessively fat persons that had tuberculosis (R. 213, 259-260), or were suffering from hyperthyroidism, or other statements.

The order that the Commission entered against respondent, constitutes a menace to every person engaged in selling any proprietary medicine, whether an antifat treatment or anything else. If the Commission can lawfully require respondent to insert in its advertisements a warning that no person may safely take its treatment except under the direction and advice of a competent physician, it can lawfully require that a similar warning shall be inserted in the advertisements of all other proprietary medicines, and thereby destroy all trade in proprietary medicines; because it appears affirmatively from the record herein (R. 95-96), that the Commission can obtain against any other proprietary medicine that is intended to be self-administered internally and contains any drug that has any physiological or pharmacological action, medical testimony to the effect that such proprietary medicine cannot be safely self-administered,—medical testimony, in other words, of the same sort as that upon which the Commission relies to justify its finding as to the falseness of respondent's implied representation, in its published advertisements, that its treatment can be safely self-administered. Inasmuch as it is doubtless true that every proprietary medicine that is intended for self-administration internally, contains some drug that has some physiological or pharmacological action, all that the Commission need do to put the vendors of all proprietary medicines out of business,—so far as their respective businesses may depend upon advertising,—is to institute against such vendors respectively, the same sort of proceeding that it instituted against respondent; call upon the members of the American Medical Association for the same sort of testimony that they supplied against respondent; and issue against such vendors respectively the same sort of order that was issued against respondent.

That the Commission's purpose was not to protect competition, and respondent's competitors, if any, in the proprietary medicinal antifat treatment trade, from being injured through respondent's advertisements, but was rather to destroy respondent's business, is shown not alone by the terms of the respondent's order, as hereinabove pointed out, but by other parts of the record also. And such other parts of the record show also that the Commission desires, if it can, to accomplish the destruction of the businesses of other vendors of proprietary medicines, as well as of respondent's business.

Thus, in his address that the Commission's Chairman, Mr. Humphrey, made to the newspaper and magazine publishers on October 9, 1928, at their trade-practice conference, he said (R. 437-438, 441):

> "The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country . . . . . This class of advertisement takes its toll of millions annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope. How can this gigantic evil of false advertising be suppressed? (R. 437-438) . . . . . Believing in the greatness of its [the publishing industry's] power and influence as I do and upon its sincere cooperation, I have a firm conviction that this conference will put more crooks and dishonest concerns *out of business* . . . . . than any one thing that has ever been done under the direction of a governmental agency" (R. 441).

And in the address that Mr. Humphrey, Chairman of the Commission, made to the National Association of Purchasing Agents, on October 9, 1928, he said (R. 408, 409):

> The magazines are filled with this class of advertisements I have mentioned [*i.e., inter alia,* "patent-

medicine advertisements for incurable diseases", and advertisements of "various methods of correcting bodily deformities", of "beauty creams and various rejuvenating cosmetics", of "various anti-fat remedies, appliances, soaps, belts, machines, powders, and medicines", and of "Hair restorers"]. The Department of Justice, the Post Office Department, and the Federal Trade Commission have all been trying to put these frauds *out of business* (R. 408) . . . . . We are going to fight these fakers and crooks and thieves until they are put *out of business*" (R. 409).

The record shows that, as previously mentioned, after the Commission, by its Chairman, Mr. Humphrey, had succeeded in coercing the newspaper and magazine publishers of the country, into consenting and submitting to the Commission's exercising, through the National Better Business Bureau, an effectual censorship over the advertising columns of the newspapers and magazines of the country, the National Better Business Bureau issued to such publishers a plan or program for conducting such censorship. Such program specified the advertising matter that was to be investigated with a view to preventing its publication, and stated that such advertising matter related, in the main, to "purported remedies, appliances, etc., which are detrimental to public health and welfare". Such "remedies, appliances, etc.," were grouped and enumerated in such program under the respective headings, "Medicinal drugs", "External health and beauty appliances" and "Tobacco cures" (R. 403). And who, after reading the record herein, can seriously doubt that the National Better Business Bureau acted in that regard, otherwise than as the Commission's agent, and under the Commission's wing, cover, and control?

The record further shows (R. 391, 407-412), that even while the question of the lawfulness of the Commission's

order to cease and desist was pending before the lower court, and before such question had been passed upon by the lower court, the Commission and the National Better Business Bureau,—acting cooperatively, and in utter and contemptuous disregard of the fact that the lower court then had the question of the propriety of the respondent's advertisements under consideration,—made vicious and aggressive use of the censorship that the Commission had brought into being, for the purpose of preventing the publication of advertisements relating to respondent's antifat treatment, and thereby nearly destroyed respondent's business altogether (R. 391, 407-412). That circumstance, colored as it was by conduct on the part of the Commission that approximated, if indeed it did not fully amount to, contempt of the lower court's dignity and jurisdiction, is eloquent of the Commission's real purpose and object in instituting its proceeding and issuing its order against respondent—namely, the purpose and object of accomplishing the immediate and complete destruction of respondent's business, by fair means or foul.

The circumstance, noted in a preceding division of this argument, that the Commission failed to adduce any substantial competent evidence that respondent had any substantial competition or any competitors in the field of selling proprietary medicinal antifat treatments for self-administration internally, further shows that the real purpose and end of the Commission's proceeding and order were the destruction of respondent's business, and not the protection of competition, or of respondent's competitors, against respondent's advertising, as constituting the using of an "unfair method of competition in commerce."

The circumstance that, as noted in a preceding division of this argument, an official of the American Medical Association,—the Director of its Bureau of Investigation—made a great effort to procure the nebulous evidence that

was adduced before the Commission in an effort to establish the existence of competition and competitors that was essential to confer upon the Commission even a specious semblance of jurisdiction, fortifies the conclusion that is compelled by the internal evidence contained in the terms of the Commission's order itself,—namely, the conclusion that the influence that was behind the Commission's proceeding and order against respondent was that of the medical profession, and that the medical profession was the intended beneficiary of the Commission's order, which it was hoped would put respondent out of business.

An observation by the lower court is relevant in the present connection. Judge Denison there said (R. 478-479):

> "The record here shows, without dispute or by implication which would hardly be denied, that the American Medical Association is engaged in a campaign against those proprietary remedies, which, it believes, ought to be used by the public either not at all or only under supervision. It has a bureau for that and other purposes, and the bureau employs a director. When it is thought that a particular advertisement should be stopped, this director takes the matter up with the Commission and with the association of 'Better Business Bureaus' which are scattered over the country. Thereupon the Commission, if it approves, files a complaint and eventually, if it is convinced of the truth of its complaint, makes the order to desist and refrain."

In view of the foregoing considerations, it is respectfully submitted that the only reasonable conclusion is that the real, as distinguished from the avowed, purpose of the Commission's proceeding and order against respondent, was not to afford protection, against respondent's advertisements, to competition, or to respondent's competitors,

in the field of selling proprietary medicinal internal anti-fat treatments in the field of interstate commerce, but was to destroy respondent's business, for the benefit of the medical profession, which is not engaged in interstate commerce; and that the institution of such proceeding, and the issuance of such order, by the Commission were therefore entirely outside the Commission's lawful powers, which are limited to protecting competition and competitors in interstate commerce.

IX.

THE ORDER TO CEASE AND DESIST THAT WAS ISSUED BY THE COMMISSION, IS SUCH IN ITS TERMS AS TO BE IN EXCESS OF THE COMMISSION'S LAWFUL POWER.

The Trade Commission Act empowers the Commission to do nothing more than to issue "an order requiring such person, partnership, or corporation [*i.e.*, the person, etc., that is being proceeded against by the Commission] to cease and desist from using such method of competition" [*i.e.*, the method "charged in the Commission's complaint"].

The last three paragraphs of the Commission's order (R. 26-27)—which, as has been noted, are the only paragraphs that are of critical importance to anybody—go beyond a mere command to "cease and desist". They are more than a merely prohibitive command. They are, in substance and effect, permissive at the least; and, indeed, they are more than merely permissive. Such paragraphs are affirmatively mandatory, subject to a condition precedent; and they are to take effect as an unconditional affirmative command if respondent shall do an act,—namely, advertise its treatment at all,—which, if respondent should omit, would be equivalent, for all practical purposes, to respondent's going out of business altogether.

In no aspect can such paragraphs be regarded as purely prohibitive, and nothing else. The truth of the above statements appears from an inspection of such paragraphs, which are as follows (R. 26-27):

> "It is now ordered that respondent Raladam Company . . . . . do cease and desist from directly or indirectly 1 . . . . 2 . . . . 3 . . . .
>
> 4. Representing that 'Marmola' can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity.
>
> 5. Representing that 'Marmola' can be taken with no harmful result to physical health without the advice and direction of competent medical authority.
>
> 6. From representing 'Marmola' as a remedy for the treatment of obesity unless such representation is accompanied by a statement that 'Marmola' cannot be taken with safety to physical health except under the direction and advice of competent medical authority."

Such paragraphs of the Commission's order say that the respondent may advertise its treatment, if it will insert in its advertisements a statement that anybody buying respondent's treatment, for the purpose of taking it, should employ a physician if he would be safe; and to that extent, such paragraphs are permissive. Such paragraphs say, further, that if respondent shall advertise its treatment at all, it shall insert such statement in its advertisements; and to that extent such paragraphs are mandatory.

The Commission has no power to issue any affirmative order, whether such order be mandatory or merely permissive. If it should be conceded that the Commission has any such power, it would follow from such concession that the Commission could approve and authorize, in ad-

vance, the formation of any combination in restraint of trade, or the use of any competitive method, that the Commission might conceive to be of such a character as would save it from violating the Sherman Act or the other anti-trust laws of the United States. That Congress intended to give the Commission any such power, can hardly be contended with any force or reason. And that the Commission has no power to issue any affirmative order has been expressly decided.

Federal Trade Commission v. *Eastman Kodak Co.* (1927), 274 U. S. 619, 621-622, 623-624, is understood to hold, in substance, that the Commission has no power to issue an order that affirmatively directs or requires that anybody shall do anything.

In *J. W. Kobi Co.* v. *Federal Trade Commission* (1927) 23 Fed. (2d) 41, (C. C. A. 2), Judge Manton, speaking for the court, said (p. 41), "It is argued that the order of the Commission should be supplemented by directing affirmatively what the petitioner may do." And he pointed out the unsoundness of such argument by saying, "But the Commission exercises only the administrative function delegated by the Act."

The statute with reference to which Judge Manton thus spoke, was the Clayton Act (38 Stat. 730). But the Commission's power in respect of issuing orders under that Act, as appears from Section 11 thereof (38 Stat. 734), is the same precisely as its power under the Trade Commission Act,—power to issue an order to "cease and desist", and nothing else.

The conclusion that the Commission has no power to issue such a command as is embodied in the last three paragraphs of its order in the case at bar, follows also from a consideration of the provision of the First Amendment that forbids any abridging of the freedom of speech.

(See *Leach* v. *Carlile* (1922) 258 U. S. 138, 140-141.) Such order, in effect, declares to respondent, "This alone, and nothing else, is truthful and honest to say and this alone, and nothing else, you shall say, if you shall say anything at all, either expressly or by implication, concerning the safety of your treatment,—namely, that your treatment may not be safely self-administered except under the direction and advice of competent medical authority". It is difficult to perceive that such command is consistent with any degree of freedom of speech on respondent's part. Such command, in effect, puts respondent in a straitjacket, so far as its speech is concerned. Congress never intended that the Commission should set itself up as the sole judge and keeper of truth and honesty, or that it should assume to say to anybody, "This statement alone embodies truth and honesty, and no other statement does or can."

It is of course essential that the Commission's order shall contain a requirement that respondent's advertisements shall refer purchasers of its treatment to the medical profession for direction and advice, if the Commission's order is to accomplish that which, as pointed out in the preceding division of this argument, is the real purpose of the order,—namely, the destruction of respondent's business, for the benefit of the medical profession. But Congress never intended that the Commission should accomplish, or even seek to accomplish, any such result.

In view of the foregoing, it is respectfully submitted that the order that the Commission issued against respondent is in excess of the Commission's lawful powers.

X.

IT WAS NOT "TO THE INTEREST OF THE PUBLIC"—AS THAT TERM IS USED IN THE TRADE COMMISSION ACT—THAT THE COMMISSION SHOULD EITHER HAVE INSTITUTED ITS PROCEEDING, OR HAVE ISSUED ITS ORDER, AGAINST RESPONDENT.

The term "to the interest of the public" is, as is said in effect in the *Klesner case* (280 U. S. 19), a definition or description of a legal concept. But as such, it is undeniably vague. Congress appears, however, often to use such term, or its equivalent, for the purpose of expressing the legislative will; but whether it is to be concluded that Congress uses such term, or its equivalent, in the same sense, and as designating the same considerations and standards as guides for action, every time,—which conclusion would appear to follow necessarily from the premise that such term defines or describes a legal concept,—has not yet been decided. That the use by Congress of the term "to the interest of the public", or its equivalent, is becoming not infrequent, appears from the fact that in Section 12 of the Trading with the Enemy Act (40 Stat. 411, 460, 1020), in defining the powers of the Alien Property Custodian, Congress directed that the Alien Property Custodian should sell property at public sale, etc., "unless the President stating the reasons therefor, in the *public interest* shall otherwise determine." Also, in Sections 9 and 11 of the Radio Act of 1917 (44 Stat. 1166; 45 Stat. 373), the issuance of licenses for radio stations is made to depend, in part, upon what the licensing authority's view may be as to whether "*public* convenience, *interest*, or necessity", and "*public interest*, convenience, or necessity", will be served by issuing a license in a particular case.

In *United States* v. *Chemical Foundation* (1924), 294 Fed. 300, 307, (D. C. Del.),—affirmed (1925), 5 Fed. (2d)

191, (C. C. A. 3), and decree modified and affirmed (1926), 272 U. S. 1,—which arose under the Trading with the Enemy Act, Judge Morris, in the District Court, said at page 307:

> "Public interest is not a synonym for money. It may not be defined in terms of finance. It embraces all the great public needs. It permits dealing with the conditions which exist in the nation so as to bring out of them the greatest welfare of its people. With the safety of the nation, the permanence of peace and the health of its citizens it is vitally concerned. In the category of the great public needs these are not outranked by the nation's revenue."

It is difficult to believe that Congress intended, when it adopted the Trade Commission Act, that the Commission should be guided by such general considerations as those that are suggested by Judge Morris' language,—by a consideration of the "permanence of peace", for instance,—in determining whether or not the institution of a proceeding by the Commission, in respect of anybody's using any "unfair method of competition in commerce", would be "to the interest of the public".

The only authoritative declaration that has been discovered, in respect to what are the proper guides or standards with reference to which the Commission must act, if it would act lawfully, in determining whether the institution of a proceeding on its part would be "to the interest of the public", is found in the *Klesner case* (280 U. S. 19).

As the *Klesner case* (280 U. S. 19) is understood, it is held therein that it is not "to the interest of the public" that the Commission should institute a proceeding in respect of "a controversy essentially private in its nature" (p. 28),—even though such controversy involves unfair competition and a possible fraudulent deception of the

public. And in that case Mr. Justice Brandeis, for the court, said at pages 27-28:

> "This requirement [*i.e.*, the requirement of public interest] is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong . . . . . To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it."

It is respectfully submitted that the institution by the Commission of the proceeding that is involved in the case at bar, cannot be shown, by reference to any evidence that appears in the record, to have been "to the interest of the public", if the question of the presence or absence of public interest in the case at bar be determined by the application of any of the guides or standards that are stated in the *Klesner case* (280 U. S. 19) to be applicable to determine the existence or non-existence of public interest in any given case.

The respondent's advertisements do not threaten the existence of present or potential competition,—as has been shown.

The *Klesner case* (280 U. S. 19), as understood, does not mean that the Commission could prevent oppression of the

weak by the strong, unless such oppression were injurious to, and tended to suppress, competition; or that the Commission could act to prevent widespread small individual losses, unless such losses were on the part of the competitors of the person against whom the Commission proceeded, and not merely on the part of members of the purchasing public.

In view of the circumstance that even such nebulous evidence as the record contains on the subject, does not tend to show that there are more than two concerns, at the outside, that are even conjecturally engaged in selling internal antifat treatments in competition with respondent, the Commission's proceeding against respondent—even if it were a *bona fide* effort, which it is not, to protect such two concerns, and, through protecting them, to protect competition—could hardly be regarded as other than a proceeding in respect of "a controversy essentially private in its nature", even if such two concerns had appeared and complained of respondent's advertisements, which neither did.

As the lower court's decision is understood, the ground upon which the lower court concluded that the institution by the Commission of its proceeding, and its issuance of its order, against respondent were not "to the interest of the public", was that all of such competitors, if any, as respondent had, were "relatively disreputable", and that it was not to the public interest to afford them governmental protection for the purpose of assisting them to continue to carry on the kind of business that they were carrying on, in the manner in which they were conducting it.

In referring to the trade in which the respondent and its competitors, if any, were engaged, and pointing out that such trade is inimical to the public good, Judge Denison, in the lower court, said in part (469-470, 476, 478, 479):

> "The medical profession has always contended that auto-diagnosis, drug-store purchases, and self-medication are dangerous to the public health and ought to be suppressed or minimized. The evil, at least in some degree, is not to be denied (R. 469-470) . . . . . Very likely every member of this court will personally fully agree with this professional opinion that such public self-medication is unwise (R. 476) . . . . . It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition (R. 478) . . . . . It appears that these methods of influence [meaning, the methods of influence by which, as appears at pages 389, 392-413, 436-452 of the record, the Commission had brought about a concerted boycott of respondent by the publishers of various newspapers and magazines throughout the country, and a concerted refusal by such publishers to print any advertisement of respondent's Marmola treatment] . . . . . have destroyed a large part of petitioner's business [meaning, the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny, nor indeed, reason to doubt, that this elimination would tend to the public good" (R. 479).

In referring to the character of respondent's competitors, and pointing out that they were all engaged in improper practices, Judge Denison, in the lower court, said in part (R. 478, 479-480):

> "It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition (R.

> 478) . . . . . When we search this record to find the legitimate activities which are to be protected [*i.e.*, by the Commission's order] against this unfair competition [*i.e.*, the alleged unfair competition charged against respondent], we observe only two such possible beneficiaries. One is the medical profession [not entitled to protection, because not engaged in interstate commerce] . . . . . The other possible beneficiary is found in the list which the American Medical Association Bureau has made up, comprising a number of other commercially exploited remedies for obesity . . . . . It is fairly to be inferred, not only that these [meaning, the other commercially exploited remedies] are on the same *index expurgatorius* as Marmola, but that they are relatively disreputable. Again it cannot be seriously contended that the machinery of the Commission was intended to give governmental aid to the protection of this kind of trade and commerce" (R. 479-480).

In a footnote (R. 479), Judge Denison said, in substance, that the Commission had erred, in having refused, as it had (R. 133), to permit respondent to establish by affirmative proof more positively than respondent had been permitted to do, the fact that the "other commercially exploited remedies", if any, that were being sold in competition with respondent's Marmola treatment, were "relatively disreputable"; "but", said Judge Denison, "the situation is too plain to require reference for further proofs."

What Judge Denison had reference to,—when he remarked that the Commission had erred in shutting off the respondent's proof as to the "relatively disreputable" character of the concerns that were being paraded by the American Medical Association as respondent's competitors,—appears in the record, at page 133. It there appears that counsel for the respondent—referring to the products

of a number of concerns, the names of which had been read into the record by Dr. Cramp (the Director of the Bureau of Investigation of the American Medical Association) from a list that he had prepared from such Bureau's files and records—put this interrogatory to Dr. Cramp, who was testifying: "Q. Does the American Medical Association regard any of these products, or the products made by the names stated in the list, as ethical products?" An objection to such interrogatory was sustained. And counsel for respondent then said (R. 133): "It is my contention that there is no proof of unfair competition in interstate commerce. These products or the manufacturers of the products that are contained in this list that was read into the record by my understanding are all under the ban of the American Medical Association, every one of them, and it is my understanding that this proceeding is not brought for the purpose of protecting them or any one of them from the competition of the respondent in this case, and I wish to show this to be a fact. That is the purpose of my question."

Additional light upon the considerations that moved the lower court to take the position that it did take as above noted, in respect of the question of public interest in the case at bar, may be obtained from a consideration of what Judge Denison said, subsequent to the decision of the case at bar, in *Ohio Leather Co.* v. *Federal Trade Commission* (1930), 45 Fed. (2d) 39, (C. C. A. 6).

In the *Ohio Leather Company's case* (45 Fed. (2d) 39), the Leather Company was charged with having used an "unfair method of competition in commerce", in that it had advertised a leather,—which it held out in its advertisements as "a distinctive calf leather",—under the trade name of Kaffor-Kid (calf-for-kid). The Commission's contention was that the public understood the word *kid*,

as applied to leather, to mean only leather that had been prepared from the skins of young goats, and nothing else; and that the public would be misled and deceived—by the presence of the word *kid* in the name Kaffor-Kid—into buying leather, and articles made of leather, that had been prepared from the skins of calves, and not from the skins of young goats. The court held that the record did not contain sufficient evidence to show that the public understood the word *kid*, in the exclusive sense that was contended for by the Commission, as meaning only leather that had been prepared from the skins of young goats, and nothing else. The court held, further, that it would not be of any avail to send the case back to the Commission, for the purpose of enabling the latter to seek to obtain additional evidence to establish that the public understood the word *kid* in the exclusive sense for which the Commission contended; because, as the court said in substance, even if the Commission should succeed in obtaining such additional evidence, the Commission, in view of other facts that appeared in the record, would still remain without power to issue any lawful order to cease and desist against the Leather Company. The other facts that, in the court's view, disabled the Commission to enter any lawful order against the Leather Company, were that all other manufacturers of leather, and all manufacturers of shoes, used the word *kid* quite as misleadingly—judged with reference to what the Commission insisted was the public's understanding of the meaning of the word—as did the Leather Company, in that all of such manufacturers used the word *kid* to designate something other than leather prepared from the skins of young goats only, and applied such word to leather prepared from the skins of old goats, and also to leather prepared from the skins of certain sorts of sheep. As the opinion of the court is understood, the court based its decision upon a consideration of the interest of the public.

Judge Denison, for the court, said at page 42:

"We recently had occasion to reaffirm our belief that there is no jurisdiction in the Commission to make an order of this kind unless there is a legitimate trade which equitably deserves protection in order that the defendant's unfair methods may not tend to restrain the trade of the fair and legitimate competitors. *Raladam Co.* v. *F. T. C.*, 42 F. (2d) 430, 435, *certiorari* now allowed 51 S. Ct. 86, 75 L. Ed. ..... [94]. The present record presents this question in a peculiar form. The manufacturers of what they call kid leather, and possibly, in some measure, the manufacturers of calfskin, may suffer from this method of competition—the former, if trade is diverted from the goatskin by the supposition that 'Kaffor-Kid' is the same thing, and the latter, if trade is diverted from the regular calfskin by advertising something as if better but perhaps at the same price. We do not suppose that the Commission's typical order to desist and refrain is made an inappropriate remedy, merely because *some* of a respondent's trade competitors are using the same unfair method which is charged against it; the Commission could not stop all these things at once; but, in that aspect of the Commission's future action in this case which may rest upon the theory that the ultimate purchaser supposes that kid is kid, and that kid shoes are made from kid leather which is made from kid skins, and thus is misled because the defendant is tacking the name to leather not made of those skins at all, we find that *the entire* associated trade, which is complaining and which the Commission is intending to protect, is also misleading the ultimate purchaser in a similar way. Lacking any proof that the purchaser did know anything about the secondary meaning which prevails among the experts, the result would be that the Commission stops the defendant from misleading the purchaser, and does so with the sole purpose and sole result of aiding and

abetting a much greater volume of misleading practice by the rest of the trade. We can confidently say that no such result, coming from such construction of the act, can have been intended by Congress."

Judge Denison's above quoted language shows the basis upon which the case at bar is to be distinguished in principle from the cases that are cited at pages 31 and 32 of the Commission's brief.

John Bene & Sons, Inc. v. *Federal Trade Commission* (1924), 299 Fed. 468, (C. C. A. 2), is understood to rest upon the same general view in respect of the public interest, as that which is understood to have been asserted by the lower court in the case at bar, and in the *Ohio Leather Company's case* (45 Fed. (2d) 39).

In the *Bene case* (299 Fed. 468), the corporation that the Commission proceeded against,—which, for convenience, may be referred to as Bene,—made and sold peroxide of hydrogen. A competitor, one Proper, made and sold a compound, called Daxol, which he represented to be good for the same purposes as those for which peroxide of hydrogen may properly be used. In truth, Daxol was a demonstrably fraudulent product, and Proper's representations concerning it were grossly fraudulent. Bene aggressively and convincingly disparaged Proper's product,—told substantially the demonstrable truth about it—to the chain-stores that were buying it, and they ceased to buy any more Daxol, to the practical destruction of Proper's business. The Commission ordered that Bene cease and desist from disparaging Daxol. But the court declined to enforce the Commission's order. Judge Hough, for the court, referring to Daxol, said (p. 473), "The public has no interest in the protection of such an article."

In view of the foregoing, it is respectfully submitted that —even upon the assumption that respondent was guilty of using an "unfair method of competition in commerce", which it was not—the lower court was right in declaring that, having regard for the relatively disreputable character of all of respondent's competitors, if any, it was not "to the interest of the public" that the Commission should have instituted its proceeding and issued its order against respondent.

XI.

CONCLUSION.

In view of the foregoing considerations, it is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted,

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